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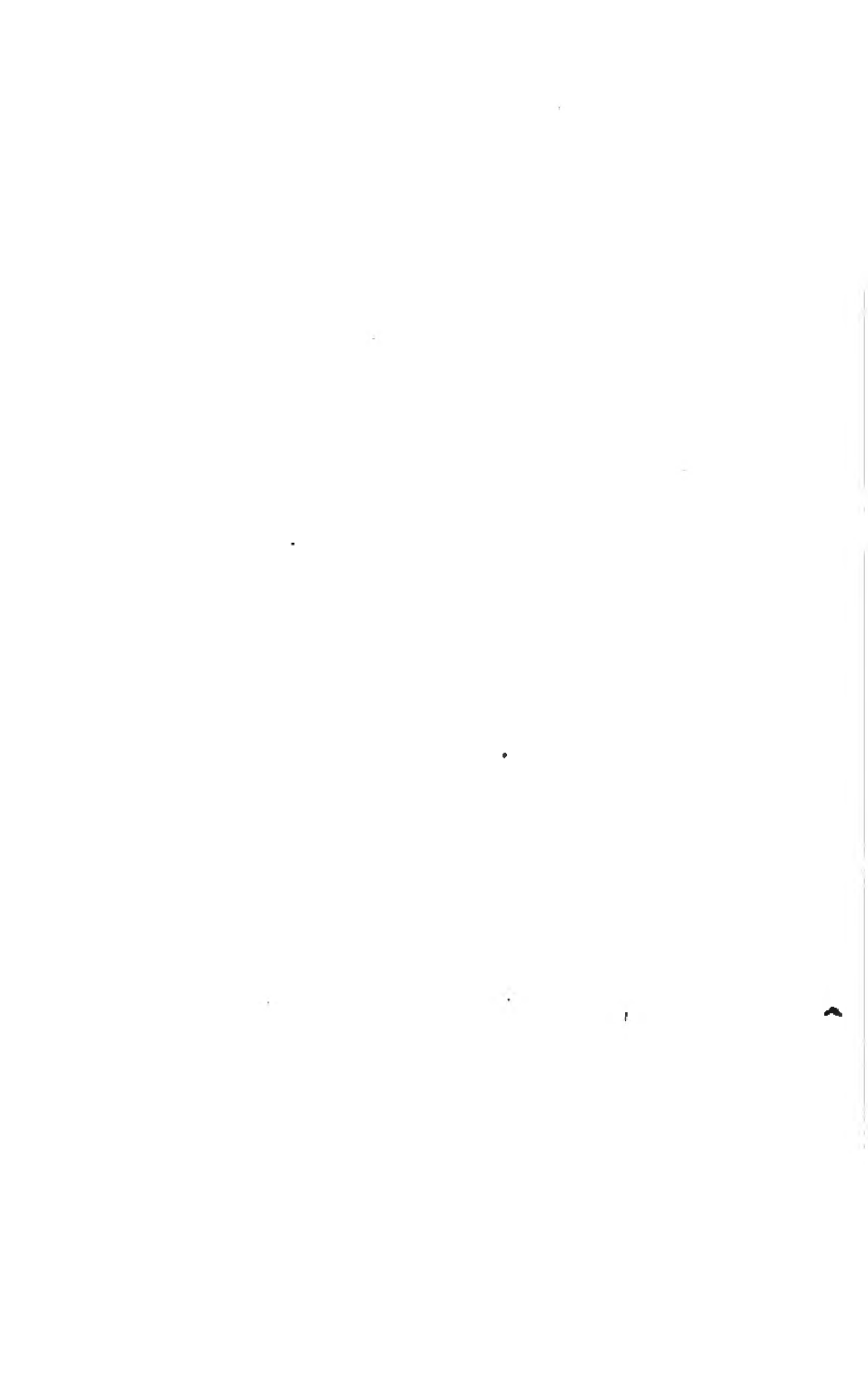
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THE CANADIAN LAW TIMES.

VOL. III.

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No. 1.

THE DEFENCE OF PURCHASE FOR VALUE WITHOUT NOTICE.

A *BONA FIDE* purchaser for valuable consideration without notice has ever been a prime favorite of the Courts of Equity. Against him they would grant no relief and would take no hostile step. The early Chancellors, and, indeed, some later ones, will scarcely be taxed with having shown too much diffidence or self-restraint in setting bounds to their own authority. Against this their child, however, they disclaimed any power or jurisdiction to grant relief. His opponent might pursue him with the utmost rigor of the law, but could get no aid from Chancery. But times are changed, and with them the powers of the various Courts and the rights and remedies of suitors. The Courts of Equity in this Province are no longer auxiliary to the Courts of Law, equity no longer follows the law, equity now is the law. Many curious, and, perhaps, some unforeseen, results have followed from this prevalence of equity. Not the least curious of these results would appear to be this, that equity now disowns her own child, and a *bona fide* purchaser for valuable consideration now finds himself an alien and without status in legal society.

The nature of the defence of purchase for value without notice, as formerly given effect to by the Courts of Equity, will appear from the following precedent for a plea in such a case :—“ Previously to and on the day of ,

A. B. was or pretended to be in the actual possession of the hereditaments in the said bill mentioned, free from encumbrances; and this defendant believing the said A. B. was so seised and entitled, on the of , agreed with the said A. B. for the purchase of the inheritance in fee simple of and in the said hereditaments free from incumbrances, and thereupon by an indenture, dated the of , and made between the said A. B. of the one part and this defendant of the other part, the said hereditaments, in consideration of the sum of £ paid by this defendant to the said A. B., were granted and assured by the said A. B. unto and to the use of this defendant, his heirs and assigns; and in the said indenture was contained a covenant by the said A. B. with this defendant, that the said hereditaments should be enjoyed by this defendant free and clear, and freely and clearly discharged of and from all encumbrances committed or permitted by the said A. B. or any person or persons claiming by, through, under, or in trust for him; and this defendant doth aver that the said consideration money of £ was actually paid by this defendant to the said A. B. at the time the said indenture was executed, and that at or before the respective times of the payment of the said consideration money and of the execution of the said indenture, he, this defendant, had no notice of the said agreement now claimed by the plaintiff, that [*denying particular facts charged as circumstances of constructive notice*] all which matters, etc.; and I, this defendant, not waiving, etc., for answer to the said bill, say as follows:—I deny that I had at any time before or at the time of the said purchase any notice whatsoever, either actual or constructive, of the plaintiff's said agreement, or that the same was charged upon or in anywise affected the said hereditaments, and I deny [*the facts charged as circumstances of notice*], and I deny that I have ever admitted to the said , in the said bill named, or to any one else, that I had, before or at the time of the said purchase, any such notice as aforesaid" (a).

(a) Lewis's Principles of Equity Drafting, p. 341.

The doctrine of the Courts of Equity upon the subject will be found to be fully set forth in the notes to *Bassett v. Nosworthy*, 2 White & Tudor, L. C. 1, and an excellent summary of the doctrine will be found in Haynes' *Outlines of Equity*, 5th ed.

“There appear to be three cases in which the use of this defence is most familiar. 1. First, where an application is made to an auxiliary jurisdiction of the Court by the possessor of a legal title, as by an heir-at-law (which was the case in *Bassett v. Nosworthy*) (b); or by a tenant for life for the delivery of title deeds (which was the case of *Wallwyn v. Lee*) (c), and the defendant pleads that he is a *bona fide* purchaser for valuable consideration without notice. In such a case the defence is good, and the reason given is, that as against a purchaser for valuable consideration without notice the Court gives no assistance—that is, no assistance to the legal title. But this rule does not apply where the Court exercises a legal jurisdiction concurrently with Courts of Law. Thus, it was decided by Lord Thurlow, in *Williams v. Lambe* (d), that the defence could not be pleaded to a bill for dower; and by Sir J. Leach, in *Collins v. Archer* (e), that it was no answer to a bill for fines. In those cases the Court of Equity was not asked to give the plaintiff any equitable, as distinguished from legal, relief. 2. The second class of cases is the ordinary one of several purchasers or incumbrancers, each claiming an equity, and one who is later and last in time succeeds in obtaining an outstanding legal estate not held upon existing trusts, or a judgment, or any other legal advantage, the possession of which may be a protection to himself, or an embarrassment to other claimants. He will not be deprived of this advantage by a Court of Equity. To a bill filed against him for this purpose by a prior purchaser or encumbrancer, the defendant may maintain the plea of purchase for valuable consideration without notice; for the principle is that a

(b) 2 Wh. & T. L. C. 1.

(c) 9 Ves. 24.

(d) 3 Brown C. C. 264.

(e) 1 Rus. & M. 284.

Court of Equity will not disarm a purchaser—that is, will not take from him the shield of any legal advantage. This is the common doctrine of *tabula in naufragio*. 3. Thirdly, where there are circumstances that give rise to an equity as distinguished from an equitable estate—as, for example, an equity to set aside a deed for fraud, or to correct it for mistake—and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the Court will not interfere” (*f*).

“The whole doctrine about the protection afforded by means of the legal estate is simply this: A party getting the legal estate acquires no right in equity in any way. But equity, regarding all the persons who have incumbrances according to their priorities, considering that the equitable interests pass just as the legal estate does, by the effect of the deeds, finds itself checked and an obstacle thrown in its way by an incumbrancer saying, ‘I have got the legal estate interposed. I insist it is mine at law, and there must be a superior equity shown in order to deprive me of my legal estate. It is merely staying the hands of the Court by resting on that legal estate which this Court will not deal with unless a superior equity be shown; and although the Court holds that priority will give equity, yet it does not hold that it will give so superior an equity as between several incumbrancers as to enable a person who has an anterior charge to wrest the legal estate from the person who has obtained it without notice of the anterior charge, and who has not parted with it. This is the whole effect of the doctrine, and none other” (*g*).

Lord Justice James, in speaking of the doctrine, says (*h*), “My view of the principle is, that when once you have arrived at the conclusion that the purchaser is a purchaser for valuable consideration without notice, the Court has no right to put him to contest the question how he is going to defend himself, or what he is going to rely on. He may

(*f*) *Per* Ld. Chr. Westbury in *Phillips v. Phillips*, 4 De G. F. & G. 217, 218.

(*g*) *Per* Wood, V.C., *Rooper v. Harrison*, 2 K. & J. 108.

(*h*) *Pilcher v. Rawlins*, L. R. 7 Ch. App. 269.

say honestly and justly, 'I am not going to tell you I have got the deeds; I defend them, and you will never be able to make me produce them at all; probably before you get half way through your action of ejectment you will find a *jus tertii* which you will not dispose of; the estate is in the hands of a legal tenant to whom I have let it, and no one can determine that tenancy without notice, and no one can give that notice but myself; I will not give that notice, and no Court has any power to make me give it. I have a right to rely, as every person defending his position has, on the weakness of the title of the person who is seeking to displace me.' That seems to be exactly the position of such a purchaser as this."

"A Court of Equity acts upon the conscience, and as it is impossible to attach any demands upon the conscience of a man who has purchased for a valuable consideration, *bona fide* and without notice of any claim on the estate, such a man is entitled to the peculiar favour and protection of the Court" (i).

Lord Loughborough says (j), "Against a purchaser for valuable consideration this Court has no jurisdiction. You cannot attach upon the conscience of the party any demand whatever where he stands as a purchaser having paid his money, and denies all notice of the circumstances set up by the bill."

These extracts, however, if read by themselves alone, and without limitation, would appear to lay down the rule somewhat too broadly, for it does not apply to a case where a legal mortgagee brings his action for foreclosure against a purchaser for value without notice of the mortgage (k). Sir John Romilly, M.R., referring to this point, said, "The distinction I apprehend to be this:—if the suit be for the enforcement of a legal claim for the establishment of a legal right, then, although this Court may have jurisdiction

(i) Sugden, V. & P. 14th ed. p. 737. adopted by the Supreme Court of the United States in *Boone v. Chiles*, 10 Peters 210.

(j) In *Ferrard v. Saunders*, 2 Ves. 454, 457.

(k) *Finch v. Shaw*, *Colyer v. Finch*, 19 Beav. 500, the latter of which cases was affirmed on appeal, 5 H. L. C. 905.

in the matter, it will not interfere against a purchaser for valuable consideration without notice, but leave the parties to law; if, on the other hand, the legal title is perfectly clear, and attached to that legal title there is an equitable remedy or an equitable right which can only be enforced in this Court, I have not found any case, nor am I aware of any, where this Court will refuse to enforce the equitable remedy which is incidental to the legal right" (l).

It must, furthermore, be remembered that the rule applies only to those cases where the plaintiff seeks aid from the *auxiliary* jurisdiction of a Court of Equity as distinguished from its *concurrent* jurisdiction. When Courts of Equity exercise a legal jurisdiction concurrently with the Courts of Law, they will not stay their hand by reason merely of the defence of purchase for value being set up, but will ascertain the legal rights of the parties, and give judgment accordingly. Thus, in *Williams v. Lambe* (m), Lord Thurlow held that the defence could not be pleaded to a bill for dower; and in *Collins v. Archer* (n), Sir John Leach held that it was no answer to a bill for tithes. "The judgment in the case of *Williams v. Lambe*, as explained by the arguments of counsel in the case of *Collins v. Archer*, is perfectly consistent with the later cases. Taken as authorities against the validity of this plea to a legal title, these two cases decided that where the Courts of Equity and Common Law had concurrent jurisdiction, if the plaintiff preferred to come into equity, the latter Court would not have allowed this plea to discovery, the only effect of which would have been, not to interpose any principle for the defendant's protection, but merely to exclude its own process. This is a very different thing from refusing the benefit of the plea where the relief sought was purely equitable, or where the Court was called upon to compel the defendant to make disclosures that might have exposed his title at law" (o).

(l) *Colyer v. Finch*, 19 Beav. 509.

(m) 3 Bro. C. C. 264.

(n) 1 Russ. & My. 284.

(o) Hare on Discovery (2nd ed.) 72, 73.

A Court of Equity will also refuse to entertain the plea where the legal estate is outstanding and the contesting parties have equitable estates only. "From the case of *Brace v. Duchess of Marlborough* (p), down to *Finch v. Shaw* (q), and *Rooper v. Harrison* (r), the rule has always been that which was laid down by Lord Justice Wood in the last of these cases and in *Stackhouse v. Lady Jersey* (s), namely, that as between equitable incumbrancers, relief will be given to the incumbrancer prior in point of date, unless he has lost his priority by some act or neglect of his; and that relief will not be refused to him as against a subsequent incumbrancer, on the sole ground of the latter being a purchaser for value without notice, unless he has the legal estate or the best title to call for it" (t).

Lord Chancellor Westbury, in *Phillips v. Phillips* (u), puts the rule thus: "I take it to be a clear proposition that every conveyance of an equitable interest is an innocent conveyance; that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to and no more. If, therefore, a person seised of an equitable estate (the legal estate being outstanding) makes an assurance by way of mortgage, or grants an annuity, and afterwards conveys the whole estate to a purchaser, he can grant to the purchaser that which he has, viz., the estate subject to the mortgage or annuity, and no more. The subsequent grantee takes only that which is left in the grantor. Hence grantees and incumbrancers, claiming in equity take and are ranked according to the dates of their securities; and the maxim applies, '*Qui prior est tempore potior est jure.*'"

"All that a Court of Equity does when it allows the plea, is to send the plaintiff without assistance to the forum proper to determine the question at issue between the

(p) 2 P. Wms. 495.

(q) 19 Beav. 500; 5 H. L. C. 905.

(r) 1 K. & J. 86.

(s) 1 J. & H. 721.

(t) Per Gifford, V.C., in *Thorpe v. Holdsworth*, L. R. 7 Eq. 146.

(u) 4 De G. F. & J. 215.

parties when the Court itself has no jurisdiction to do so. If the Court of Equity has either concurrent or exclusive jurisdiction, it refuses to allow the plea, for if it did not do so, its conduct in the first case would cause unnecessary delay and expense; in the second case, it would amount to an absolute denial of justice. It follows that if Courts of Equity were invested with complete legal jurisdiction, the plea could no longer be used" (v). Lord Hardwicke, speaking of the peculiar nature of the plea, says, "It could not happen in any other country but this, because the jurisdiction of law and equity is administered here in different Courts, and creates different kinds of rights in estates; and therefore, as Courts of Equity break in upon the common law, where necessity and conscience require it, still they allow superior force and strength to a legal title to estates; and therefore, where there is a legal title and equity on one side, the Court never thought fit that by reason of a prior equity against a man who had a legal title that man should be hurt; and this, by reason of that force, this Court necessarily and rightly allows to the common law and legal titles. But if this had happened in any other country, it could never have been made a question; for if the law and equity be administered by the same jurisdiction, the rule *qui prior est tempore potior est jure* must hold" (w).

In the last edition of Coote on Mortgages (x), it is said, "Since the Judicature Act, the position of a plaintiff with the legal title is altered. Every Court can now enforce legal as well as equitable claims. So that a mortgagee with the legal estate can join in the same action claims for foreclosure and for delivery of the deeds; and the defence of purchase *bona fide* for valuable consideration without notice would not, it seems, avail. In other respects the law remains unaltered."

It is submitted that this is too narrow a view of the effect of the Act, and that its effect is to do away with this de-

(v) 2 W. & T., L. C. 25.

(w) *Wortley v. Birkhead*, 2 Ves. Sr. 573.

(x) 4th ed. 864.

fence, not only where the plaintiff has the legal title, but also in all other cases. The only other cases that can exist are, 1st, where the legal title is outstanding; 2nd, where the defendant has the legal title. In the first of these cases there would be a contest between two equities, and, as we have already seen, the first in time would prevail. In the latter case, if the defendant's legal title be a perfect title he has no need of relying upon the defence of purchase for value, while, if it be not a perfect title, the Court can no longer stay its hand, and, refusing to inquire into the matter, tell the plaintiff that they leave him to seek his remedy at law. The plaintiff is now entitled to get in any Court all his remedies both legal and equitable.

In this connection, it may be well to quote the remarks of the present Master of the Rolls, in a case which recently came before the Court of Appeal in England. Speaking of legal and equitable estates, he says, "There is an agreement for a lease under which possession has been given. Now, since the Judicature Act, the possession is held under the agreement. There are not two estates, as there were formerly, one estate at common law, by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court, and the equity rules prevail in it" (y).

In the most recent English case in which the defence of purchase for value without notice has been raised, Cotton, L.J., says: "Here we have the owner of the legal title coming into a Court of Law and Equity, and saying, there is an attempt to deprive me not only of my property but of my title deeds. The legal title is shown to be in the plaintiff; and then, not merely as a Court of Equity but as a Court of Law, we ought to make the order which has been made in the Court below for the delivering up of the title deeds to the legal owners of the property" (z).

Although the defence of purchase for value without notice would appear to be abolished in this Province by the effect

(y) *Walsh v. Lonsdale*, 21 Chy. D. 14.

(z) *Re Cooper, Vesey v. Vesey*, 20 Chy. D. 611.

of the recent fusion of law and equity, yet there will remain certain defences which may still be rendered available, and which may at first sight appear to be somewhat analogous defences, but which in reality are based upon entirely distinct and dissimilar grounds. An instance of such a defence may be seen in the case of *Totten v. Douglas* (a), where the *bona fide* assignee for value of a voluntary mortgage was allowed to maintain his mortgage against creditors of the mortgagor upon the ground that the advances made by the assignee had furnished an *ex post facto* consideration for the mortgage, and thereby rendered valid that which was voidable at its inception. Gwynne, J. (b), distinctly repudiates the idea that the equitable doctrine of purchase for value without notice had anything to do with the case. Other instances will appear in those cases which give rise to the application of the doctrine that where one of two innocent persons must suffer by the wrong of another, the one who enables such other to commit the wrong must bear the consequences. For the limitations of this doctrine see the judgment of Woodruff, J., in *Sprights v. Hawley* (c), where he says, "It is only where the owner has parted with the legal title upon some secret trust or condition, or has done something calculated to mislead, upon which a third person has a right to rely, and on which he does rely, as evidence of authority, that such maxim could have any application." Possibly other instances may arise upon application of the doctrine of estoppel *in pais*, as laid down in *Pickard v. Sears* (d), that "where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

A sort of statutory recognition of this defence has been given in the "Act to amend the Law of Property in On-

(a) 18 Gr. 341.

(b) At page 345.

(c) 39 N. Y. (Ct. of Appeal) 448.

(d) 6 Ad. & E. 474.

tario" (e), whereby it is provided that in order to maintain the defence of purchase for value without notice, it shall not be necessary to prove payment of the mortgage money or purchase money; and further, that in certain cases the defence may be set up by the purchaser of a mortgage in the same manner as by the purchaser of the mortgaged property. It is submitted that the only effect of these provisions is, that in a case where the defence of purchase for value without notice would otherwise be available, it shall not fail for the reason merely that the defendant has not paid the mortgage money or purchase money, or that the defendant is the purchaser of a mortgage only and not of the mortgaged estate; and if the effect of the fusion of law and equity is to do away with this defence in other cases, it is assumed that the statute would not lend any force to the defence in the cases mentioned.

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(e) R. S. O. cap. 95, sections 8 and 9. As to the state of the law before this enactment and the effect of the Act, see *Peterkin v. Macfarlane*, 4 App. R. 57 to 60.

WAYS OF NECESSITY BY IMPLIED GRANT.

“As a general rule, a grantee of lands or of an easement is entitled by implied grant to any easement in the land of the grantor, which is necessary to render the land or easement granted capable of enjoyment to the full extent. This rule of law seems to depend upon the principle that when the grant was made it must have been the intention of the parties that the grantee should have the means of using the thing granted, and therefore that he should have all rights and powers in or over the grantor's soil, which might be requisite for his purpose” (a). And *Pomfret v. Hicroft* (b) is cited, where it is said that “when the use of a thing is granted, everything is granted by which the grantee may have and enjoy such use. As if a man gives me a license to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter and dig the land to mend the pipes, though the soil belongs to another and not to me.”

“Tenant at will is where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. * * Yet if the lessee soweth the land, and the lessor, after it is sown and before the corne is ripe, puts him out, yet the lessee shall have the corne, and shall have free entry, egress and regress to cut and carrie away the corne, because he knew not at what time the lessor would enter upon him” (c). And the note upon the text—“and shall have free entry, egress, and regress”—is as follows: “For when the law doth give anything to one, it giveth impliedly whatsoever is necessary for the taking and en-

(a) *Goddard on Easements*, p. 76.

(b) 1 Wms. Saund. at p. 322, c.

(c) Co. Litt. 55 a.

joying of the same" (d). We have here the foundation of the right to a way of necessity, and we propose to consider the characteristics of such ways in this paper.

Foundation of the right.—A way of necessity is the right in the grantee of a parcel of land to access thereto, when the land is totally inaccessible and worthless, unless the owner is permitted to use the adjoining land as a means of approach. The right has occasionally been said to depend upon public policy, it being against public policy that land should lie idle. The safer ground to place it upon is that stated in the above authorities, because the reason of public policy will apply as well to the case of a land-locked parcel excepted or reserved out of a grant, and it seems fairly open to debate on principle, though perhaps concluded by authority, whether a way of necessity exists in such a case; and, moreover, it seems not to exist where such a parcel escheats. But of that hereafter.

In *Morris v. Edgington* (e), Sir James Mansfield said, "Now what is the case here? There is no way that we hear of, at all, belonging to these premises, except the way over the land in question. * * I say nothing of what is a way of necessity; I know not how it has been expounded, but it would not be a great stretch to call that a necessary way, without which the most convenient and reasonable mode of enjoying the premises could not be had." This case has been sometimes cited for the proposition that where there is a way, but an inconvenient one, the grantee may have a convenient one across his grantor's premises. But the dictum stands alone and has been frequently disapproved of. It, in fact, disproves itself, for the way would not be a way of necessity, but a way of convenience. The question is not, what is *convenient* for the dominant owner, but what is *necessary* for him, in order that he may use his land.

In *Dodd v. Burchell* (f), it is said that a way of necessity cannot be claimed because it is more convenient than

(d) Co. Litt. 56 a.

(e) 3 Taunt. at p. 31.

(f) 1 H. & C. 113.

another way which the party has. Wilde, B. says, "There is no foundation for such a doctrine."

In *City of Hamilton v. Morrison* (g), Adam Wilson, J., says, "It may have been a more convenient way for his going to the market, but mere convenience confers no such right, nor does it create a way of necessity."

In *Holmes v. Goring* (h), Park, J., says, "From all the authorities referred to it is clear that when a way is claimed of necessity, it is a good answer to show that there is another way which the party may use."

In *Barlow v. Rhodes* (i), Bayley, B., in answer to the remark of counsel, that a certain way was a way of necessity, said, "Defendant might make a way by breaking through his wall." And a somewhat similar remark was made in *Pheysey v. Vicary* (j), by Pollock, C.B. "The whole law," said the learned Judge, "admitted to be such as to drains and water-courses, turns on the right to 'reasonable enjoyment' of the house. Had the backway from the plaintiff's house into the road been originally walled up, the front way might still be said to be in some sense not of necessity, for the present entrance might have been made out of the the back wall." In that case the rear of two houses which fronted to the south, abutted on a highway to the north of them. A carriage road entered from this street, and passing along the west side of the westerly house wound round in front, or to the south of both houses. The plaintiff, who owned the easterly house, claimed a way of necessity along this carriage road to the highway, though he had a rear entrance through his coach-house door which opened upon the highway. His claim to the more convenient approach by the carriage road was the occasion of the above remark.

From these authorities, notwithstanding the dictum of Sir James Mansfield, from the very nature of the case, from the appellation which has been assigned to this species of way,

(g) 18 C. P. at p. 224.

(h) 2 Bing. 76.

(i) 3 Tyr. at p. 284.

(j) 16 M. & W. at p. 490.

it is abundantly clear that the right rests upon the absolute necessity that the party has of going across another's land in order to reach his own.

Exists only when grant implied.—In the note to *Pomfret v. Ricroft* (k), it is said, "Now a way of necessity, when the nature of it is considered, will be found to be nothing else but a way by grant. It derives its origin from a grant. For there seems to be no difference, where a thing is granted by *express words*, and where by *operation of law* it passes as incident to the grant." It has, therefore, been held that where a grant cannot be implied, a way of necessity cannot exist, and *Holmes v. Goring* (*supra*), is cited in a note as a confirmation of this opinion.

But in *Proctor v. Hodgson* (l), the point came more strikingly into notice. In that case the claimant to the way of necessity derived title to the land-locked parcel by escheat. The case is not a satisfactory one, however, as it was upon a point of pleading. Parke, B., said, "Even if the pleadings had contained a sufficient allegation of a way of necessity at the time, I am still of opinion that it would have been insufficient, and that no right of way of necessity can exist when the title of the parties is by escheat." Some doubt is thrown upon this opinion by Alderson, B., who says, "It must be shown that the party to whom the land was granted or escheated (supposing escheat were equivalent to a grant), had no other way." The whole point rests upon the matter of the parenthesis. If title by escheat is equivalent to title by grant, then the right to the way exists. A perusal of Blackstone's commentary upon Title by Escheat leaves one still very much in doubt. At the conclusion of his chapter on this head, after speaking of the devolution of an estate held by a corporation upon its dissolution, he says, "The law doth tacitly annex a condition to every such gift or grant, that if the corporation be dissolved, the donor or grantor shall re-enter; for the cause of the gift or grant faileth. This is, indeed, founded upon the self-

(k) 1 Wms. Saund. at p. 323 a, note (c).

(l) 10 Ex. 824.

same principle as the law of escheat ; the heirs of the donor being only substituted instead of the chief lord of the fee." We think it will not be disputed that the grantor to the corporation, and the chief lord of the fee, are both in as of their old estates, the one taking title by reversion the other by escheat. The chief lord then stands in the same position as if he had originally granted all the lands, except the land-locked parcel, which has escheated to him. The way of necessity must have been created originally by a grantor, who severed a piece of land of which he theretofore had unity of seisin. If that piece of land was wholly land originally granted by the lord of the fee, the position of the parties, upon escheat of the land-locked parcel, would be in effect this, that the surrounding land had been granted and the land-locked parcel retained by the chief lord ; and the question would then be, does there exist in the chief lord, by implied reservation from his grants to the surrounding occupiers, a way of necessity over their lands to his parcel, and if so, over the lands of which of them ? If the servient tenement, which existed at the time of the escheat, was never part of the escheated estate, *quære* whether any question could ever arise as to a way over it, because its owner and his predecessors in title are total strangers to the title by escheat ; and *quære*, whether the question would not be the same as that first propounded, and whether the way, if any exist at all, would not be over some part of the old estate of the chief lord. The right to a way of necessity by implied reservation we shall touch upon hereafter.

It may then be stated that, as far as the authorities go, there cannot be a way of necessity except where a grant can be implied, because the way is an incident to the grant.

Locality of the way.—Some difference of opinion has existed as to the proper locality of the way. In the ancient case of *Packer v. Walsted* (m), it was said that the grantee might take a convenient way without the permission of the grantor, and the law would then adjudge whether it was convenient and sufficient or otherwise. All seem agreed

(m) 2 Sid. 111.

that the way must be a convenient one for the grantee. But how should it affect the servient owner?

In *Clarke v. Rugge* (n), it is said, "The feoffor shall assign the way where he can best spare it."

In *Morris v. Edgington* (supra), the more convenient of the ways, each of necessity, was allotted to the dominant owner. In *Bolton v. Bolton* (o), it was held that when there was more than one way the grantee might select the way.

In *Osborne v. Wise* (p), it is said, "The law would give as a way of necessity the nearest passage along the land of the grantor to the nearest public highway." This case is cited by Esten, V.C., in *Fielder v. Bannister* (q), where, though it was not necessary to express an opinion, he says, "It would seem that a way of necessity is the one most convenient for the grantee."

But in the same case, Spragge, V.C., points out most conclusively, we think, that *Osborne v. Wise*, is not a correct expression of the law. He says:—"The consequences of such a doctrine would be mischievous. * * Looking at the language and the spirit of the authorities to which I have referred, and the necessity of the thing, I think that the interest of the grantor as well as the grantee are to be taken into account in determining what as between them is a convenient and reasonable way; and that if a way answering these conditions be assigned by the grantor the rights of the grantee are satisfied, and he is bound to accept it, and at his own expense, to make it fit for his own use." We might add to this, that the shortest way to the nearest public highway might be directly through the grantor's house, while a way, quite as convenient but a little longer, lying around his house, would answer the purpose as well. It would be difficult to establish the right of the dominant owner under such circumstances to go through the house, especially when it is remembered that the way is incident to the grant, passes by the presumed intention of the grantor, and must

(n) 2 Roll. Abr. 60, pl. 17.

(o) L. R. 11 Chy. Div. 968.

(p) 7 C. & P. 761.

(q) 8 Gr. 257.

therefore be such a way as could be reasonably attributed to the grantor as intended to be included in his grant. And at page 260 of the same case the same learned Judge says:—"The easement of the plaintiff to have a right of way over the defendant's fifty acres is not denied; but the question which arises is whether a certain way assigned to the plaintiffs by the defendant along the westerly side of his land is such a way as they are bound to accept." Speaking of the passage already quoted from *Wms. Saunders*, the learned Judge proceeds:—"This seems material, as it places the grantee in the same position as if his conveyance stipulated in terms for a convenient way over the land of the grantor as long as the necessity for it should exist. But the question remains, whether the grantee has the right to select the locality of the way or the grantor. * * I believe there is an absence of any direct authority as to the right of the grantee having a right of way of necessity, himself to select over what portion of the grantor's land the way shall pass; unless indeed the grantor refuses or neglects to assign to him a convenient and reasonable way. * * As on the one hand the grantee is not bound to use the same way as had been used by the grantor, so on the other hand I think the grantor is not bound to assign the way previously used by himself, provided another way naturally convenient can be assigned. * * I think the right of the plaintiff is not to the best possible line of road (as was put by Mr. Baron Alderson), but that it is qualified by the effect which the selection of a particular line would have upon the interest and convenience of the defendant."

In *Pheysey v. Vicary* (*supra*), Alderson, B., said at page 496, "a way of necessity does not necessarily mean the most convenient way that could by possibility exist."

The interpretation of this law by Spragge, V.C., seems to be the most reasonable one, and the safest guide.

It is also to be noticed, that in determining whether a way of necessity exists to certain premises, the means of access must be considered with reference only to a point in the limit of the land of him claiming the way. If any

part of his premises abuts upon a highway, it seems, he must enter at that point, even though in doing so he may have to break through a wall, as was intimated in *Barlow v. Rhodes* and *Pheysey v. Vicary* (*supra*), and this is the meaning of Baron Rolfe's remark, at page 495 of the report of the latter case, when he says, "a way of necessity means a convenient way to the close, not to the house as here claimed."

Extent and mode of user.—Ways of necessity are co-extensive with the necessity, and are exercisable only while the necessity exists. This was doubted by Parke, B., in *Proctor v. Hodgson* (*supra*), referring to *Holmes v. Goring* (*supra*). That learned Judge said, "I should have thought it meant as much a grant for ever, as if expressly inserted in a deed." To this it may be answered, that, after all, it is a grant by implication—the implication being that, as there is no other access to the land from a highway, the grantee shall have a way of necessity over the lands of him who created the necessity. But there is no implication that the grantor would have made the grant if the necessitous circumstances had not existed. The grant is limited to the necessity as it arises by necessity. The object and intent of the grant are fulfilled when the highway becomes immediately accessible to the grantee from his own soil. *Buckby v. Coles* (r) also throws a doubt upon the proposition.

At any rate, the case of *Holmes v. Goring* has been approved, and the dictum of Parke, B. has been disapproved. In that case, a way of necessity existed across lands of the plaintiff. Subsequently the defendant acquired a piece of land adjacent to the dominant tenement, which afforded a way between the defendant's closes. *Held*, that the way across the plaintiff's land ceased with the necessity for it. Best, C.J., said (quoting from Wms. Saunders), "'a way of necessity, when the nature of it is considered, will be found to be nothing else than a way by grant;' but a grant of no more than the circumstances which raise the implication of necessity require should pass."

A way of necessity is a way suitable for the purposes of the person requiring it at the time it is created. A way for agricultural purposes cannot be used as a way for other purposes (s).

EDITORIAL REVIEW.

Jurisdiction of a Division Court Judge without his own County.

By number 14 of sec. 92 of the B. N. A. Act, the Provincial Legislatures have power to make laws respecting the administration of justice in the Province, including the constitution, etc., of Provincial Courts. But for section 96 of the Act, this would have included the right to appoint the Judges to all Provincial Courts. So it is in effect held in *Regina v. Bennett*, 2 C. L. T. 547. Both the reading of section 96 of the B. N. A. Act and the effect of this decision show that the appointment of the Judges of all Courts, except those mentioned in 96, lies with the Provincial Legislatures. They may therefore erect Division Courts, and we see no reason why they should not appoint the Judges thereto. By section 19 of the Division Courts Act, the County Court Judges and junior Judges are the Judges of the Division Courts. These Judges, therefore, act under a statutory commission, just as the Superior Court Judges act in the Dominion Election Cases, under the statutory commission of the Controverted Election Act; see *Valin v. Langlois*, 3 S. C. R. 1. Whether the Provincial Legislature adopts the County Court Judges as Judges of the Division Courts, or appoints others, makes no difference in principle. As Division Court Judges, they are entirely within the jurisdiction of the Provincial Legislature, and we do not see why their personal jurisdiction (if we may use the expression) may not be extended beyond their counties by that Legislature.

(s) *City of London v. Riggs*, L. R. 13 Chy. Div. 798; *Gayford v. Moffatt*, L. R. 4 Chy. App. 133.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Supreme Court of Canada.

ONTARIO.]

FORRESTAL v. McDONALD.

Leave to Appeal—Ontario Judicature Act, 1881, sec. 43.

A motion for leave to Appeal to the Supreme Court of Canada from the Court of Appeal, under sec. 43 of the Judicature Act, had been refused by the latter Court. A motion was then made to Mr. Justice Fournier for leave to appeal, who referred it to the full Court. The amount in question was \$576.30.

The Court while doubting the constitutionality of sec. 43 of the Judicature Act, gave leave to the applicant to give security for the proposed appeal, Counsel for the applicant abandoning the motion for leave to appeal.

Gormully, for the motion.

Maclean, contra.

BICKFORD v. HOWARD.

Trial by Judge without Jury—Verdict on Verdict Affirmed by Court—Appeal—Weight of Evidence.

Where a verdict has been found by a Judge sitting without a jury, and the verdict has been affirmed (in this case by the Courts of Queen's Bench and Common Pleas, and the Court of Appeal dismissing appeals therefrom; 1 C. L. T. 265), this Court will not reverse the conclusion

arrived at by the Courts below on the weight of evidence, unless convinced beyond all reasonable doubt that all the Judges before whom the case has come have clearly erred.

Robinson, Q.C. and McCarthy, Q.C., for the appellant.

E. Martin, Q.C., for the respondent.

QUEBEC.]

MAJOR v. CITY OF THREE RIVERS.

Appeal from Queen's Bench—Case Originating in Circuit Court.

Held, that an appeal will not lie to the Supreme Court of Canada from a final judgment of the Court of Queen's Bench in a case which originated in the Circuit Court.

MacLaren, for the appellant.

Denoncourt, for the respondent.

BOURGET v. BLANCHARD.

Order of Judge below—Rescinding same—Jurisdiction.

Held, that this Court has no jurisdiction to entertain a motion for leave to appeal from a judgment of the Court of Queen's Bench, and to rescind an order made by a Judge of the Court of Queen's Bench, refusing to grant leave to appeal from the judgment of that Court, and to order the said Judge, or any Judge of the Court below, to receive the security offered by the appellant.

Turcotte, for the appellant.

Livernois, for the respondent.

BRITISH COLUMBIA.]

BANK OF BRITISH NORTH AMERICA v. WALKER.

Extension of time for Appealing—Difficulty in preparing Case.

Where an order extending the time for filing the printed case and *factums* had been made, and the time had expired, and where the Clerk of the Court below had refused to certify to the case as printed, on the ground that it was not correct, though it had been settled by the Chief Justice of the Court below, and though the appellants were willing to do all that was necessary in order to have it corrected to the satisfaction of the Judge,

Held, that the time should be further extended, with costs to the appellants of the motions. The Court intimated that if any further obstacles were placed in the way of appellants this Court would take the necessary means in order to have a speedy hearing of the appeal.

Christie, for the appellants.

McIntyre, contra.

Dominion Election Cases.

P. E. ISLAND.]

In re QUEEN'S COUNTY ELECTION CASE.

Wrongful initialling of ballots by Deputy Returning Officer—Marking of ballots.

The initialling of counterfoils instead of ballots, by a deputy returning officer, will not, in the absence of fraud, vitiate an election.

Held, also, that a line drawn from a name on the ballot to a cross made by the voter, did not destroy the vote.

PETERS, J.—The first question to be decided is the initialling question. The facts respecting this question are, that in three districts, the deputy returning officers put their initials as well as the voter's number, on the face of the counterfoil, leaving the ballot papers put into the box uninitialed. About 675 ballot papers were thus left uninitialed. The returning officer returned Mr. Brecken elected by a majority of — votes. But on a re-count, the County Court Judge rejected all the ballots which had not the deputy returning officer's initials on the back, thus disfranchising about 675 voters. If the decision of the County Court Judge on this point were sustained, Mr. Brecken would thereby lose 15 votes, but I am of opinion, that the irregularity of the deputy returning officer did not affect the validity of these votes.

By sec. 5 of the 41 Vict. cap. 6, "the deputy returning officer is directed to deliver to the voters a ballot paper, on the back of which such officer shall previously put his initials so placed that when the ballot paper is folded they can be seen without opening it, and on the counterfoil of which ballot paper he shall have placed a number corresponding to that opposite the voter's name on the voter's list." There are more directions to the officer and made chiefly for the purpose of enabling him to be sure that the paper returned to him by the voter is the same as that which he delivered to him.

It seems to me a startling proposition, that the error of the *officer*, in putting his initials on the counterfoil instead of on the back of the ballot should have the effect of disfranchising whole districts of voters. The duty of initialling the ballot paper is cast on the officer who is to deliver these papers (in the majority of cases) to voters entirely unacquainted with the requirements of the law in this respect, and who therefore have a right to suppose that the officer has correctly performed his duty. To hold that the mere non-compliance of an officer (acting *bona fide*) with some of these directions is to deprive the voters of their franchise, is so monstrously unjust that the well-known rule applies, that where according to one construction a statute would be unjust, absurd and mischievous, and, according to another it would be reasonable and just, the Court is bound to adopt the latter as the intention of the Legislature. If the language of the statute

was such as plainly to import that the Legislature intended an irregularity of this kind to have this effect, then no doubt the Judge, as observed by Maxwell, would have to remember that his office is *jus dicere*, not *jus dare*. But there are no words expressive of such an intention to be found in this Act.

It was argued that the initialling on the back of the ballot paper was intended not only to enable the officer to see that the paper returned to him was the one he furnished to the voter, but also to enable the parties on counting the ballots to detect any ballots which might have been surreptitiously dropped into the box. Such probably was one of its objects. But there is no suggestion of fraud here, and the evidence proves that on opening the ballot boxes the number of ballots corresponded exactly with the number of votes on the voters' list. It is therefore abundantly established that no ballot could have been put into the boxes except those which the respective deputy returning officers dropped in themselves.

Besides, by an English Act, all ballot papers not having the official mark on the back are to be rejected. The 55th sec. of 41 Vict. cap. 6, does not declare that the deputy returning officer shall reject all ballot papers not initialed, but "all ballot papers *which have not been supplied by him.*" So that instead of any default which would authorize the deputy returning officer or the County Court Judge to reject the uninitialed ballot papers, (unless there is some circumstance to show they have not been so supplied) or, at all events, the moment, from the evidence and the correspondence of the number of ballot papers with the voter's list, it is evident that all the ballot papers and the box had been supplied by the officer, there was no error and the County Court Judge was bound to count them.

The next question is the scrutiny of the whole votes. Having on the trial decided on the validity of all the votes except one, I think it unnecessary to reiterate reasons then given for the decision on each challenged vote.

I will only remark that the rule I adopted was, that where the intersection of the lines forming the cross was within the lines, I held it a good vote for the candidate whose name was within the line. But where (as in several instances was the case) the intersection of the lines of the cross was on the division line between the names of the candidates I rejected it.

The vote reserved for consideration was in District No. 32, vote 1. It was crossed for Davies and was all scored out. Mr. Peters objected to the allowance of this vote on the ground that the scoring out of the cross opposite the name of Davies was a distinguishing mark and the County Court Judge rejected the vote on this ground. If I felt myself at liberty to construe the Act, unaffected by decisions, some of which are binding on me, I should agree with him, with respect to this vote as well as to another vote. After the cross was properly made for Jenkins, a line manifestly not the result of an accident, was drawn from Jenkins' name to the intersection of the cross, and which would enable a person who had an agreement with the voter to ascertain how he had voted.

The Dominion Controverted Elections Act and 41 Vict. cap. 6, provides that "any ballot papers *which have not been supplied by the deputy*

returning officer, or on which votes are given to more candidates than one, or on which there is any writing or mark by which a voter *could* be identified shall be rejected by the returning officer in counting the ballot papers." The 2nd sec. of the English Act of the 35 & 36 Vict. cap. 60, (1882,) is to the same effect, and in *Woodward v. Sarsons*, L. R. 10 C. P. 747, it was held, that under that section such a mark did not vitiate the vote, unless evidence was given of an agreement that the voter would make such a mark, and this decision seems to have been followed by Blake, V.C., in the *Monck Election Case*, 12 C. L. J., N. S. 113.

The Court of Common Pleas seems to construe the words " by which the voter may be identified," to mean identification simply by seeing the mark on the paper itself, or by connecting the mark with other available (that is, I presume, known) facts. Now, if the object in prohibiting distinguishing marks was to prevent bribery by rendering it impossible for the briber to know whether the party he has bribed voted as he agreed to do, then the holding the ballot with such distinguishing mark good unless some previous arrangement, such distinguishing mark, be proved, seems to me to be a construction which, in the majority of cases, would entirely defeat the object which the Legislature had in view, because, in ninety cases out of one hundred, it would be impossible to procure evidence of such agreement, however strongly the nature of the marks might lead one to suspect it. In the *James* case, Lord Coleridge, with respect to two votes, says: " We, with some hesitation, disallow Nos. 844 and 889; there is no cross at all, and we yield to the suggestive rule that the writing by the voter of the name of the candidate, may give too much facility by reason of the hand-writing, to identify the voter." Now, it seems to me that the *James* reasoning should have led the Judge to reject those with distinguishing marks. The recognition of the votes, in both cases, depended on a chance; the first, on the chance of some one recognizing the hand-writing, and the second, on the change of some one possessing a key to the mark which would enable him to recognize it. But whatever my opinion as to the right construction of the Statute may be, I feel myself bound by the decision, and allow both votes.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 24TH NOVEMBER, 1882.]

REGINA v. BISSELL.

Neglect to support wife—Conviction—Wife's Evidence—Admissibility of.

Held (Armour J., dissenting), that the evidence of a wife is inadmissible on the prosecution of her husband for refusal to support her.

Neville, for the motion.

Fenton, for the conviction.

[DECEMBER, 1882.]

REGINA v. NELSON.

Case reserved—Witness absent from Canada—Depositions of witness—Admissibility of.

Upon a prosecution for uttering forged United States notes, the depositions of one S., taken before the police magistrate on the preliminary investigation, were read, upon the following proof that S. was absent from Canada :—R. swore that S. had, a few months before, left her (R.'s) house where she (S.) had for a time lodged ; that she had since twice heard from her in the United States, but not for six months. The chief constable of Hamilton, where the prisoner was tried, proved ineffectual attempts to find S. " by means of personal inquiries in some places, and correspondence with the police of other cities." S. had for some time lived with the prisoner as his wife.

Held, upon a case reserved (Cameron J., dissenting), that the admissibility of the depositions was in the discretion of the judge at the trial, and that it could not be said that he had acted wrongly in admitting the depositions.

Osler, Q.C., for the prisoner.

Scott, Q.C., for the Crown.

REGINA v. O'ROURKE.

*Criminal Law—Selection of Jurors—32-33 Vict. cap. 29, sec. 44. (D.)—
Writ of Error—Challenge to the Array.*

By 32-33 Vict. cap. 29, sec., 44 (D.) every person qualified and summoned to serve as a juror in criminal cases according to the law in any province, is declared to be qualified to serve in such province, whether such laws were passed before the B. N. A. Act or after it, subject to and in so far as such laws are not inconsistent with any Act of the Parliament of Canada.

By 42 Vict. cap. 14 (O.) and 44 Vict. cap. 6 (O.) the mode of selecting jurors in all cases, formerly regulated by 26 Vict. cap. 44, was changed. The jury was selected according to the Ontario Statutes, and the prisoner challenged the array, to which the Crown demurred, and judgment was given for the Crown. The prisoner was found guilty and sentenced, and he then brought error.

Held, per Hagarty, C. J., that the Dominion Statute was not *ultra vires* by reason of its adopting and applying the laws of Ontario to criminal procedure.

Semble, that under sec. 139 of the 32-33 Vict. cap. 29, where no undifference or fraudulent dealings of the sheriff are shown, any irregularities are not assignable to error.

Per Armour and Cameron, JJ. The objection raised by the prisoner was not a good ground of challenge to the array.

Quære, whether when such a question has been reserved by a Judge at the trial, it can afterwards be made the subject of a writ of error.

Murphy, for the prisoner.

Irving, Q.C., for the Crown.

[HAGARTY, C.J., 17TH NOVEMBER, 1882.]

OMNIUM SECURITIES CO. v. CANADA F. & M. INS. CO.

Fire insurance — Mortgagor and Mortgagee—Subrogation—Mortgagor's fraud in obtaining policy.

M., who had mortgaged his real estate to the plaintiffs, subsequently, on 2nd April, 1881, effected an insurance upon the buildings with the defendants, loss, if any, payable to the plaintiffs. Attached to the policy on a printed slip dated 27th May, 1881, was the following clause:—"It is hereby agreed that this insurance as to the interest of the mortgagor only therein shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy." A loss having occurred, the defendants disputed their liability, and the matter was referred to an arbitrator, who made his award in favour of the

plaintiffs, after refusing to admit evidence on behalf of the defendants that the policy had been obtained by fraud.

Held, that the above clause provided only against future acts, that the defendants did not thereby guarantee the policy to the plaintiffs as indisputable, and, therefore, that they were not debarred from setting up that the insurance had been effected by fraud, and the case was remitted to the arbitrator for the admission of such evidence.

Held, also, that the clause did not amount to a new insurance in favour of the mortgagees.

Wallace Nesbitt, for the plaintiffs.

McCarthy, Q.C., for the defendants.

WIDDIFIELD v. SNIDER.

Voluntary conveyance—Undue influence.

The defendant, a grand-nephew of the plaintiff who was of advanced age and feeble in mind, obtained from the latter a conveyance, without power of revocation, of a piece of land, her only property and means of support, for a nominal consideration, on the verbal promise to maintain her for the remainder of her life. He brought with him a stranger from a distance as a witness to the deed, but near relatives who lived in the neighbourhood were not consulted. It was explained to the plaintiff that the defendant, being a minor, could not legally bind himself to maintain her.

Held, that the deed was invalid on account of the enfeebled mind of the grantor, but independently of this, that upon the evidence it was voluntary, improvident, and executed without independent advice, and should therefore be cancelled.

[CAMERON, J., 13TH DECEMBER, 1882.]

In re INGERSOLL & CARROLL.

Municipal by-law for taking gravel to repair streets—Award—Uncertainty.

Pursuant to a by-law of the town of Ingersoll, permitting that Municipality to take gravel from C.'s land for repairing their streets without mentioning the quantity, an award was made that the corporation should "pay to C. the sum of 32½ cents for every cord of gravel or stone they should take for the repairs of their roads * * as and for compensation for the injury done * * that the right to take such gravel or stone at the price aforesaid shall extend for five years from the date hereof."

Held, that the by-law should have described the quantity of gravel required to be taken, and that the award should have fixed the value of the quantity required as well as the amount to be paid for the right of entry to take the same away, and therefore that the award was bad.

Walter Read, for the motion.

T. Wells, contra.

[15TH DECEMBER, 1882.]

REGINA v. REEVES.

Cab driver—License.

Held, that R. S. O. cap. 174, sec. 415, which provides that the Board of Commissioners of Police shall in cities regulate and license the owners of cabs, etc., used for hire, does not authorize the imposition of a license fee upon the drivers of such vehicles ; nor does the 43 Vict. cap. 31, sec. 21, which empowers the Board to license any trade, calling, business or profession, or the person employed in such trade, etc., extend the power of the Board over persons not within its jurisdiction before, so as to validate the imposition of such a license fee.

O'Sullivan, for the defendant.

G. H. Watson, contra.



[OSLER, J., 6TH NOVEMBER, 1882.]

GILES v. MORROW.

Dower, action for—Husband's absence for more than seven years—Presumption of death—Damages for detention of dower.

Held, that the presumption of death, arising from continued absence of the demandant's husband, unheard of since 12th August, 1874, was sufficient to sustain an action of damages as against the objection that he is still living.

Quære, whether damages for detention of dower, or arrears of dower, can be recovered under the Dower Act ?



COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 9TH DECEMBER, 1882.]

In re HALL.

Court of Appeal equally divided—Certificate of Court of Appeal—Res judicata—Habeas Corpus.

On an appeal to the Court of Appeal from the judgment of the Chancery Division refusing a motion for the discharge of one Hall, detained in custody for the purposes of extradition to the U. S. A., under the warrant of the County Judge, and brought up under a writ of *Habeas Corpus*, and remanding him to such custody, the Court was equally divided ; but the certificate of the Court of Appeal declared that it was ordered and adjudged that the appeal should be dismissed, and the judgment of the Chancery Division affirmed. A writ of *Habeas Corpus* having been subsequently issued, under which Hall was brought before the Common Pleas Division and his discharge moved for,

Held, that the certificate of the Court of Appeal was a judgment of that Court; that the matter was *res judicata*; and that the writ of *Habeas Corpus* had therefore improvidently issued, and must be quashed.

Murphy, for the prisoner.

Fenton, contra.

[HAGARTY, C.J., 24TH NOVEMBER, 1882.]

CITIZENS' INSURANCE CO. v. PARSONS.

Appeal, dismissal of—Money paid into Court as Security—Payment out—Allowance of Appeal by Privy Council—Return of money.

An appeal to the Court of Appeal by the Citizens' Insurance Company against a judgment obtained against them by P. was dismissed with costs. A further appeal by the company to the Supreme Court of Canada was dismissed with costs. The company had paid into Court on the first appeal the amount of the judgment, with interest and costs, together with a further sum as security for the costs of the appeal; and on the second appeal, a sum as security for costs of that appeal; and on the dismissal of the appeal by the Supreme Court, these moneys were paid out by Judge's order to G. and M., to whom P. had assigned them. The company then appealed to the Privy Council, and the appeal was allowed. An action was brought to recover the amount paid into Court by the company, and paid out on Judge's order.

Held, that the company were entitled to recover the moneys so paid out of Court for principal and interest, with interest thereon from the date of payment out, at six per cent.; and, also, all sums paid for costs, but without interest.

J. F. Smith, for the plaintiffs.

McCarthy, Q.C., for the defendants G. and M.

J. Reeve, for the defendant P.

[ARMOUR, J., DECEMBER, 1882.]

SPEARS v. MILLER.

Estate for life—"Demise and let."

Held, that the word "demise" is an effective word to convey an estate of freehold, and is of like import with, and equivalent to, the word "grant," in the conveyance of an estate in fee.

Held, therefore, that an estate for life was validly created by the words "demise and let."

[CAMERON, J., 25th NOVEMBER, 1882.]

ANDERSON v. WOOTEN.

Churchwardens, liability of as corporation—Free church—Church Temporalities Act.

Held, that under sections 2, 3 and 6 of 3 Vict. cap. 74, the Church Temporalities Act, a vestry capable of electing churchwardens, forming or constituting a corporation under the Act, so as to vest in them the right or liability as such of suing or of being sued, must be composed of persons holding pews in the church by purchase or lease, or of persons holding sittings therein by lease from the churchwardens; and is therefore inapplicable to a church where the sittings are wholly free.

Held, therefore, on demurrer to the defence, that an action on a contract made by churchwardens of a free church was not maintainable against their successors in office.

Delamere, for the demurrer.

Worrell, contra.

CHANCERY DIVISION.

[THE DIVISIONAL COURT.]

RUMOHR v. MARX.

Delay in setting cause down—Solicitor's mistake—Time, computation of.

Judgment had been given for the plaintiff at the trial of his action. The defendant's solicitor, intending to set the cause down for re-hearing before the Divisional Court, the sittings of which commenced on the 7th December, tendered a precipe to the Clerk of records and writs on the 30th November, but the clerk refused it on the ground that there should be seven clear days between the day of setting down and the first day of the sittings.

G. D'Arcy Boulton, Q.C., now moved, upon notice to the plaintiff, for leave to set the cause down. He contended that Rule 522, which requires the cause to be set down "at least seven days" before the day of the sittings, is within the operation of Rule 456, which excludes only cases in which the term "clear days" is used. If this were not so, then he contended that it was shown that the plaintiff's solicitor knew of the intention to set the cause down, and the solicitor's mistake in wrongly construing the rule should be relieved against. In the affidavits which he read in support of the motion it was stated that, from conversation between the clerks of the respective solicitors, the plaintiff's solicitors were aware of the intention to re-hear the case. The plaintiff's solicitor denied that he knew of the intention to re-hear; that in conversation with the defendant personally the latter intimated that there would be no appeal, but that it lay with his solicitor; and that when the last day for setting the cause

down expired without notice of re-hearing he informed the plaintiff that the judgment was indisputable.

E. Douglas Armour, for the plaintiff. "At least seven days" is equivalent to "seven clear days;" *Beard v. Gray*, 3 Chy. Chamb. 104; *Hayes v. Hayes*, 1 C. L. T. 283; *Young v. Higgins*, 6 M. & W. 49; *Mitchell v. Foster*, 9 Dowl. 527; *R. v. Shropshire*, 8 Ad. & E. 173. The mistake is therefore a clear mistake of the solicitor, which the Court will not relieve against; *International Fin. Soc'y v. City of Moscow Gas Co.*, L. R. 7 Chy. Div. 247; *Dunnard v. McLeod*, 8 P. R. 343. The case does not fall within *Taylor's* case, L. R. 8 Chy. Div. 643, where the opposite party was notified in time. The judgment of the Court was delivered by

THE CHANCELLOR, 7th December, 1882.—I think we are precluded by the authorities from giving the leave asked. The expression "at least seven days," has always been considered equivalent to "seven clear days." The mistake was a clear mistake of the solicitor, and, according to the judgment of James, L.J., in the case in 7 Chy. Div., that is not a sufficient ground for depriving the plaintiff of his vested rights in his judgment.

The motion is refused with costs, but without prejudice to the defendant to move to extend the time for going to the Court of Appeal, if he be so advised.

[9TH DECEMBER, 1882.]

FOLEY v. THE CAN. PERM. L. & S. CO.

Re-hearing—Expiry of time for setting down—Excusing delay.

The judgment which the plaintiff desired to re-hear was delivered on the 22nd November, 1882. The plaintiff's solicitor heard the result by mail on the 24th November, and immediately applied for a copy of the judgment, but did not receive it until 29th November, the last day for setting down the cause for re-hearing before the Divisional Court. He had no time to consult counsel or receive instructions from his client as to re-hearing or further action.

Held, that the delay had been sufficiently excused, and on account of the impossibility of setting down the case in time, leave was granted to set it down now for re-hearing on payment of costs.

Moss, Q.C., for the motion.

Leonard, contra.

[THE CHANCELLOR, 22ND NOVEMBER, 1882.]

NORTHWOOD v. THE TOWNSHIP OF RALEIGH.

Municipal works—Drainage—Flooding lands—Damages—Benefit to land—Expropriation.

The defendant municipality, as part of a system of drainage, collected and conveyed surface water by means of an artificial drain through the plaintiff's land to a natural stream. The outlet was sufficient at first to

carry off the water, but as the township became more thickly settled, and private drains increased, the outlet became insufficient to permit of the discharge of the contents of the drain, and the plaintiff's land was in consequence overflowed.

Held, that the defendants were bound to provide a proper outlet for waters collected by them, and that by permitting them to be discharged upon the plaintiff's land they committed an offence against the law.

It appeared that the plaintiff's land was greatly benefitted by the drainage, and that he had not sustained loss by the partial flooding.

Held, that the flooding amounted to an expropriation of part of the plaintiff's lands, and that under 36 Vict. cap. 48, sec. 373 (O.), he would only be entitled to compensation for damages (if any) in excess of the advantages derived from the works.

[THE CHANCELLOR, 1ST DECEMBER, 1882.]

PETRIE v HUNTER.

GUEST v. THE SAME.

Contract for building—Default of contractor—Verbal contract with sub-contractor—Statute of Frauds—Mechanics' lien.

Default having been made by a builder under a contract to build a house, he was dismissed by his employer under a clause in the contract authorizing the dismissal. The owner verbally employed a sub-contractor to finish the building.

Held, that this was a new and independent contract, and not an agreement to answer for the debt, default, or miscarriage of another, and was therefore binding, though not in writing, and also that the sub-contractor under his new agreement was not bound by any of the clauses in the original agreement.

Bond v. Treahy, 37 U. C. R. 360, distinguished.

Held, also, that the sub-contractor, after the making of his new contract, was entitled to rank as a contractor under the Mechanics' Lien Act, and not as a sub-contractor.

Black, for the plaintiff.

J. Reeve, for the defendant.

ATTORNEY-GENERAL v. MIDLAND RY. CO.

Ejectment by Crown—Statute of Limitations—Pleading—Demurrer—Costs.

Action by the Attorney-General upon the relation of the Rursar of Toronto University to recover possession of certain lands claimed to be vested in Her Majesty for the benefit of the University. Defence, that the land in question had been, with the assent and permission of the Uni-

versity and the Bursar as agent, taken possession of by the defendants for the purposes of their railway in that behalf under the statutory powers enabling them to expropriate the land, and that they have since retained and now are in possession thereof, and submitting that the sole remedy of the plaintiff is to recover compensation ; and also that the claim of the plaintiff is barred by the Statute of Limitations.

Held, on demurrer, that it was not necessary to set out specifically the Act under which the alleged expropriation took place, or the various proceedings connected therewith.

Held, also, that the Statute of Limitations was no bar to the action, although the action was brought by the Crown in its capacity as Royal Trustee of the land in question.

Reg. v. Williams, 39 U. C. R. 397, approved ; *Attorney-General v. Magdalene College*, 6 H. L. C., distinguished.

Where one or more paragraphs of a pleading are demurred to, the Court may properly look at any other paragraph or paragraphs bearing on the same matter, and if the whole taken together disclose a sufficient defence, the demurrer must be overruled.

A demurrer will not lie to an ambiguous or uncertain pleading ; the proper remedy is to apply in Chambers to strike out or amend the defective matter.

Held, also, that the demurrer being partly successful and partly unsuccessful, neither party should get costs.

J. A. Patterson, for plaintiff.

Bethune, Q.C., and *Black*, for defendants.

SEGSWORTH v, MERIDEN SILVER PLATING CO.

Fraudulent preference—Pressure—Chattel Mortgage—Description of property—Costs.

Where a creditor, knowing his debtor to be in difficulties, but not knowing him to be insolvent, under threat of suing him procured a chattel mortgage upon the debtor's stock in trade,

Held, that the mortgage so obtained was not a fraudulent preference within the meaning of R. S. O, cap. 118, though the debtor was in fact insolvent at the time.

The goods and chattels comprised in the chattel mortgage were gold and silver watches, jewelry, etc., and though many of the articles might have been identified by reference to their numbers, the only description of the goods was by reference to their being "in the possession of the mortgagor in this said store."

Held, sufficient.

About one-sixth of the goods seized under an execution were not included in the chattel mortgage in question, though they were claimed by the mortgagees.

Semble, that, in an interpleader issue where the mortgage was upheld the mortgagees would be entitled to the general costs of the issue, less one-sixth.

[23RD DECEMBER, 1882.]

BARKER v. WESTOVER AND WIFE.

Husband and wife—Joint tort—Joint personal liability.

The defendants went wrongfully into possession of land and received the rents and profits. The plaintiff in his claim charged the defendants with the wrongful entry and receipt, and claimed possession, but did not allege separate estate in the wife. The defence was struck out in Chambers and a reference directed to the Master in ordinary, in whose office the defendants filed an account of rents received by them, but did not appear. The plaintiff then presented a petition setting out that the female defendant had land of her own and asking for an order for payment by her.

Held, that the plaintiff's claim being based upon the torts of the defendants, there was a joint personal liability by them to the plaintiff for wrongfully taking possession and receiving rents, that it could not be inferred that the wife was coerced by her husband, which, if the fact, should have been set up as a defence and proved, and that the plaintiff was entitled to judgment, and the usual execution against the wife, under which *semble*, that the land could be sold.

Bain, for the plaintiff.

Langton, for the defendants.

PARKE v. ST. GEORGE.

Chattel mortgage—True agreement not stated—Assignment for benefit of creditors—Creditors, meaning of—Right of assignee to set aside mortgage—Action by creditor—Effect of.

The defendant on 24th January, 1882, took from Q. & A., who were in his debt, a chattel mortgage for \$2,400, which as the mortgage showed, purported to be the debt. The true arrangement was, that the defendant was still to advance according to his discretion \$800 of this sum. The agreement as to advances was not in writing and there was no change of possession. On 3rd March, 1882, Q. & A. made an assignment for the benefit of creditors and the assignee took possession. On the 11th March, 1882, the defendant seized the goods for an alleged breach of the mortgage, removed them to his warehouse and sold them, the proceeds by agreement remaining in his solicitors hands. The plaintiff was a creditor at the time the mortgage was made, but had not obtained judgment when the service took place.

Held, (i) that the mortgage was void as against creditors, (ii) that the plaintiff was a creditor within the meaning of the Chattel Mortgage Act, (iii) that he had the right to bring his action before obtaining judgment

and execution, (iv) that the defendant was in no better position as against creditors by a conversion of the property into money on the undertaking given.

Held, also, that the assignee took only the equity of redemption under the voluntary assignment to him, the mortgage being valid as between the parties to it and volunteers under them, and that he could not attack the mortgage as representing creditors.

Held, that, as the assignment intervened between the invalid mortgage and the judgment and execution in favour of the plaintiff against Q. & A., the effect of holding the mortgage invalid was to allow the goods to fall into the assignment for the benefit of creditors generally.

W. Cassels, for the plaintiff.

Bethune, Q.C., and *Falconbridge*, for the defendant.

CLARKSON v. WHITE.

Insolvent Act of 1875—Repeal, effect of—Personal earnings of insolvent after assignment—Amendment—Costs.

An assignee in insolvency is entitled to all the earnings of an insolvent, earned after the initiation of the insolvency proceedings and before his discharge, which are not necessary for the reasonable maintenance of the insolvent and his family.

An insolvent applied part of such earnings to the purchase of land for the benefit of his wife.

Held, that the assignee was entitled to a lien upon the land for the amount of the earnings so applied.

Held, also, that the repeal of the Insolvent Act of 1875, before claim made by the assignee for such lien was no bar to the claim. The original plaintiffs were not entitled to any relief, but by amendment a party was added to whom relief was granted.

Held, that the defendants were entitled to the costs of the action up to the date of the amendment.

Moss, Q.C., and *Gibbons*, for the plaintiff.

McKelcan, Q.C., for the defendant White.

Kingsford, for the defendants, the freehold L. & S. Co.

[FERGUSON, J., 9TH DECEMBER, 1882.]

Re BINGHAM & WRIGGLESWORTH.

Vendor and purchaser—Title—Statute of Uses—Rule in Shelley's case.

Where by deed certain lands were limited as follows:—*Habendum* "unto the said party of the second part, his heirs, executors, administrators and assigns, upon the following trusts, that is to say, in trust for the sole and separate use of the party of the first part (the grantor) for his natural life, and after his decease in trust for the said party of the third part (the grantor's wife) for her natural life, and after her decease in trust for the

heirs of the party of the first part forever. And in the event of the party of the party of the first part surviving the party of the third part, then upon the further trust and confidence forthwith to convey and revest the said trust premises to and in the said party of the first part, his heirs, executors, administrators and assigns, for his and their own proper use and benefit forever. But should the said party of the third part survive the the said party of the first part, then and in that event, and in the further event of the decease of the party of the third part, upon trust to convey, transfer and make over the said trust premises to such person or persons, and in such shares, interests and proportions, and for such estates, and in such manner, and upon such considerations as the said party of the first part shall in and by his last will and testament order, designate and appoint. But in the event of the said party of the first part dying intestate, then in trust to sell and dispose of, by private sale or public auction, for the most money, or to convey, transfer and set over the said premises for his heirs, executors, administrators and assigns."

Held, that the grantor was entitled to the fee subject to the life estate in favour of his wife.

Held, also, that the three parties to the deed could convey to a purchaser a fee simple in possession.

WILKINS v. McLEAN.

Pledge of Mortgage—Purchase of equity of redemption by pledge—Sale—Account of profits.

Where a mortgage belonging to a trust estate was deposited by the trustee with a third party as security for an advance to the trustee, and the pledgee subsequently representing himself to be interested in the mortgaged estate, procured a conveyance of the equity of redemption, which he re-sold at a profit.

Held, that he was not bound to account to the pledgor for the profit so made.

Moss, Q.C., for plaintiff.

W. Cassels, for defendant.

WATSON v. KETCHUM.

Compromise of action—Lien—Arbitration—Condition precedent.

Upon the trial of an action of ejectment, in the year 1875, an agreement was come to between the plaintiff and defendant in the following terms :—
 " It is agreed that a verdict be entered for plaintiff by consent, and verdict not to be enforced until defendant shall have paid \$50 towards his costs, and the value of the improvements he has made and are now on the lands in question herein, the value of such improvements to be determined by the award of Peter McNab, Thomas Knight, and Robert Hewitt, or a majority of them. Award to be made in writing on or before the 1st day of June, 1875, or such further time as the arbitrators, or a majority of them,

may appoint. Plaintiff agrees to pay said \$50 and amount so to be awarded to the defendant, and defendant agrees therefor to execute a quit claim deed of said lots to plaintiff, and give up possession, both parties to release each other from all further claims." The plaintiff in the action afterwards, without paying the \$50 or the value of the improvements, signed judgment and recovered possession under a writ of *hab. fac. pos.* Both parties to the action of ejectment died. No two of the arbitrators named could agree upon the amount to be awarded as the value of improvements.

Held, in an action by the devisee of the deceased defendant in ejectment, against the devisee of the deceased plaintiff in ejectment, that the former was entitled to a lien on the land in question for the \$50 agreed to be paid, and also for the value of the improvements to be ascertained by the Master.

Held, also, that the making of the award of the arbitrators as to the value of the improvements was not a condition precedent to the right to recover therefor.

FOSTER v. STOKES.

School trustees—Election—Waiver—Retraction of waiver.

At an election of school trustees the plaintiffs received the highest number of votes. Objections were made to the validity of the election, but no legal proceedings were taken to set it aside; a meeting, however, was held by the School Board, at which the plaintiffs were present, at which the alleged irregularities in the election proceedings were discussed, and at which it was agreed, the plaintiffs concurring, that there should be a new election. A new election was accordingly ordered to take place; the plaintiffs offered themselves and solicited votes as candidates for election until the day before polling, when the twenty days for protesting the first election had expired, when they claimed to be elected by virtue of the first election. The second election proceeded and the defendants were elected.

Held, that the first election had been waived by the plaintiffs, and they could not retract their waiver.

Moss, Q.C., for the plaintiffs.

S. H. Blake, Q.C., and *R. Meredith*, for the defendants.

SUMMERS v. SUMMERS.

Will—Construction of—Devise of land not owned by testator—Evidence of intention.

A testator devised to the plaintiff lot 14 in the 10th concession of A. The testator did not own, and never had owned, that lot; but he did own lot 21 in the 14th concession of A., which was not specifically devised by the will. The residuary devise was as follows: "And the balance of said estate that may remain after paying above bequests, to be paid to my relatives as my executors may think advisable after paying them a fair remuneration for their time and expenses." The plaintiffs claimed to have

the clause in the will devising lot 14 reformed, so as to express the alleged true intention of the testator, and made to read as a devise giving to the plaintiff J. S. the E. $\frac{1}{2}$, and to the plaintiff W. S. the W. $\frac{1}{2}$ of lot 21 in the 14 concession ; or that the residuary clause might be construed to vest any undisposed of property absolutely in the executors, and that they might be authorized to convey lot 21 to the plaintiffs in equal proportions.

Held, that the plaintiffs were not entitled to either relief prayed.

Held, also, that the evidence of the testator's intention was not admissible.

McCLUNG v. McCRAKEN.

Specific performance—Undisclosed principal—Husband and wife—Statute of frauds.

A husband offered his wife's land in exchange, in a letter addressed to the plaintiff's agents, in the following terms:—" I have had an examination made of the buildings on King street and regret it is of a very unfavourable character. The buildings were, I learn, once condemned, and had to be rebuilt ; the tenants have always been of migratory character, never remaining long in them. Under these circumstance I do not feel disposed to entertain Mr. McClung's present offer. If he will assume my mortgage amounting to \$11,200, and pay me in cash \$3,750, I will assume his mortgage of \$5,000 on the leasehold. This offer to remain open till to-morrow. I remain, yours truly, Thomas McCracken.

" Messrs. Pearson Bros.

" Or I will sell him my south houses for \$11,500, \$6,000 cash, balance on mortgage to suit his convenience."

The plaintiff accepted the offer in the following terms:—" ——— McCracken, Esquire,—Your offer of this date for the exchange of my property on King street for your property on St. George street, I will accept on your terms. Yours respectfully, Jno. McClung."

Held, that this was not sufficient contract in writing to satisfy the Statute of Frauds as against the wife.

The wife subsequently signed a conveyance of the land to the plaintiff, but the conveyance contained no recital of the alleged contract, was never delivered, and was produced at the trial from her custody.

Held, that the conveyance could not be relied on by the plaintiff in support of the alleged contract of which specific performance was sought.

J. E. Rose, Q.C., and J. H. Macdonald, for plaintiff.

MacLennan, Q.C., and Drayton, for defendant.

IN CHAMBERS.

MAGURN v. MAGURN.

Interim alimony—Foreign marriage—Foreign divorce.

Where a foreign divorce of a foreign marriage is set up as a defence to an action for alimony, and its validity is disproved on grounds which

would render it void, if true, the defendant must bear the expense of the litigation to determine the right to alimony, and an order for interim alimony is therefore proper.

The plaintiff, an American citizen by birth, was married at her home in Detroit to the defendant, who, though a Canadian by birth, had been for some years engaged in travelling about the United States of America as an agent, etc., and claimed to have acquired a domicile at St. Louis, Mo., where, for some three years, about the time of his marriage, he had a resident partner. The plaintiff and defendant lived together as man and wife for six years, and had two children. They had no permanent home, but, during the year ending in April, 1876, had been living at St. Louis. In April, 1876, they separated by mutual consent, and the wife, with her husband's concurrence, came to Toronto to reside, bringing with her their only surviving child.

In May, 1877, the defendant, who had been paying the plaintiff an allowance of from \$40 to \$50 a month, telegraphed and wrote to her to come to the Suspension Bridge, where he met her and took her to an hotel on the American side, and she was there served with notice of a petition for divorce, filed by the defendant in the Circuit Court of St. Louis against her on the ground of desertion, and with a copy of the petition and of an affidavit verifying the alleged desertion.

She made no defence to the petition, and a decree of divorce was granted by the St. Louis Court in June, 1877. The defendant continued to pay the plaintiff \$40 a month till September, 1881, when he ceased to make any further payments, and thereupon the plaintiff brought this action for alimony. Upon the application for interim alimony, founded on an affidavit of the plaintiff proving the marriage and desertion, and that the plaintiff was without means of support, the Master in Chambers made an order for interim alimony at the rate of \$25 per month, holding that he could not determine the validity of the alleged decree of divorce. From this order the defendant appealed.

C. Millar, for the appeal, contended that the decree of divorce, being a judgment, in *rem Gould v. Crow*, 57 Mo. 200, is binding everywhere, and "ought to be held everywhere as complete dissolution of the marriage," *Story*, Conflict of Laws, s. 597; and "full faith and credit shall be given in each State to the . . . judicial proceedings of every other State," *Story*, Conflict of Laws, s. 2296. He also referred to *Kinnear v. Kinnear*, 58 Barbour (N. Y.) 424; *Warrender v. Warrender*, 2 Cl. & Fin. 488; *Briggs v. Briggs*, L. R. 5 P. D. 153; *Harvey v. Farnie*, L. R. 5 P. D. 153.

C. R. W. Biggar, contra, referred to *Ronalds v. Ronalds*, L. R. 3 P. D. 259; *Bird v. Bell*, 1 Lee, 209; and cases cited in *Browne on Divorce* (4th ed.) 169. He urged that the plaintiff is entitled to interim alimony on establishing the fact of marriage (cases cited in *Taylor and Ewart's Ont. Jud. Act*, p. [104]); the divorce set up by defendant admits the marriage, and the foreign decree is not binding here unless obtained without fraud and from a court having jurisdiction over the parties, both of which prerequisites are here disputed; and the plaintiff is entitled, on proof of marriage, to litigate these questions at the defendant's expense *Cullen v. Cullen*, per V.C. Mowat, 1867, not reported. The order should be varied as

to the amount of alimony allowed. . The husband's income last year was \$2,000, and for three years before this £450 a year, of which at least 1-5th should be allowed to the plaintiff. *Ernst on Marriage*, pp. 195, 197; *Williams v. Williams*, L. R. 1 P. D. 370.

13th November, 1882—The CHANCELLOR. I think no case has been made for interference with Mr. Dalton's order. The defence founded on the foreign decree of divorce was anticipated in the statement of claim, and attacked on grounds which, if true, would render it void. There has been a marriage *de facto* as well as *de jure*, and the principle of *Cullen v. Cullen* applies here, viz., that the defendant must pay the expense of the litigation to determine the wife's right to alimony. That case was affirmed by the full Court on rehearing and must be followed here.

I see no reason, either, for interfering, as the plaintiff wishes me to do, with the Master's discretion as to the *quantum* of alimony. The defendant's income is shown to be precarious, and the circumstances under which the defendant allowed alimony at the rate, first of \$50 and afterwards of \$40 a month, have entirely changed, since the plaintiff no longer has to support the child on whose account alone the defendant swears he made any allowance whatever.

The appeal will be dismissed with costs.

[THE CHANCELLOR, 23RD DECEMBER, 1882.]

BEATY v. BRYCE.

Interpleader—Scale of costs.

The plaintiff issued execution for \$101, costs of suit in an action in the Chancery Division, and the goods seized thereunder being claimed, the sheriff interpleaded. Upon the motion for a final order, the claimant contended that the costs of the interpleader should be upon the County Court scale. The learned Master in Chambers, held that the scale of costs is a matter for the taxing officer to decide, the liability for costs only being determined in Chambers; but he thought that they should be taxed upon the higher scale.

Held, (on appeal from the Master by his leave) reversing his decision, that all interpleader issues involving sums under \$400, in whatever Division arising, should be disposed of by reference to the County Courts for trial, and that costs should be awarded accordingly; and that in this case the costs should be taxed on the County Court scale.

Held, also, that a Judge may properly give directions as to the scale of costs, without leaving it to the taxing officer.

Held, also, that there would have been no jurisdiction to hear this appeal but by leave of the Master in Chambers.

Allan Cassels, for the plaintiff.

Wardrop, for the defendant.

Dunbar (Bethune & Co.), for the sheriff.

[THE MASTER IN CHAMBERS, 11TH DECEMBER, 1882.]

FENWICK v. BAKER.

Absconding Debtors Act—Common Appearance—Debtor let in to Defend—Proceeding.

A solicitor had appeared for an absconding debtor, against whom a writ of attachment had issued, and had undertaken to give special bail, and afterwards, with the consent of the plaintiff's solicitor, entered a common appearance.

Held, that at this stage an order to proceed was not necessary, the defendant having been let in to defend, and the plaintiff might plead as in an ordinary action under the latter part of Rule 4 of the Judicature Act, though it would still be necessary for him, before obtaining judgment, to prove his debt under sec. 9 of the Absconding Debtors Act.

Black, for the motion.

LOWSON v. CANADA FARMERS' INS. CO.

Writs of execution—Expiry—Renewal.

On the 12th December, 1881, writs of *fiери facias* were issued from the office of the Clerk of Records and Writs and sent to the Sheriff of the County of Wentworth. On the 9th December, 1882, the plaintiff's solicitors wrote to the sheriff to return the writs for renewal. On the 11th December, 1882, not having received the writs, they telegraphed the sheriff, who replied that the writs had just been mailed. On the same day the plaintiff's solicitors lodged a precipe for renewal of the writs with the Clerk of Records and Writs. On the 12th December, 1882, the writs were received from the sheriff, and on the same day Symons applied to the Master in Chambers for an order that the writs might be renewed, as of the day on which the precipe was lodged.

14TH DECEMBER, 1882. THE MASTER IN CHAMBERS:—I do not see that this is the fault of the sheriff or other officers of the Court. It is rather, I should suppose, that the application for the return, for the purpose of renewal, was delayed a little too long. It seems a case where there is no power to make this amendment. See *Clarke v. Smith*, 2 H. & N. 753; *Naser v. Wade*, 1 B. & S. 728; *Doyle v. Kaufman*, L. R. 3 Q. B. D. 7.

[21ST DECEMBER, 1882.]

McDOUGALL v. McDOUGALL.

Fi. fa.—Expiry of—Issuing new writ.

On the 10th January, 1872, writs of *fiери facias* were issued by the plaintiff upon a judgment, and placed in a sheriff's hands, where they expired in the course of the year. On a motion made this day upon notice to the defendant for leave to issue new writs, pursuant to Rule 356, the defendant did not appear.

Held, that the plaintiff was entitled to new writs for the amount of the judgment, with interest thereon, and the amount of taxed costs and interests, together with the fees due on all former writs and sheriffs' fees. The defendant to pay the costs of the motion.

C. A. Durand, for the motion.

NOVA SCOTIA.

In the Supreme Court.

[McDONALD, C.J., AND JAMES AND RIGBY, JJ., 7TH NOV., 1882.]

ANDERSON *et al.* v. SUTHERLAND *et al.*

Insolvent Act, 1875—Filing claim—Payment of composition—Waiver.

Defendants, being insolvent, executed a deed of composition and discharge under the insolvent Act, 1875, by which they covenanted to pay their creditors a composition on their respective claims, payable in instalments. Plaintiffs filed their claim in compliance with the provisions of the Act, showing a balance due them, for which they accepted composition notes, which were paid by the defendants. Subsequent to the payment of the notes and after the lapse of the time provided for the payment of the composition, plaintiffs filed a second claim for the same indebtedness, but omitted to credit defendants with a note with which they were credited in the account annexed to the first claim. The action was to recover the composition on the larger balance created by the omission of the credit. A verdict having been given in favour of plaintiffs for the amount of composition claimed and a rule taken to set the same aside,

Held, that plaintiffs having been offered and having accepted the composition agreed to be paid on the claim first filed by them, waived the right to be paid a composition on any larger sum, or to contend that their claim against the defendants should have been made up without the credit given in such claim.

To get the advantage of any such additional indebtedness, plaintiffs should have withdrawn the first, and filed, by leave of the Judge, an amended claim for the increased amount before payment of the composition on the first claim.

There is no authority to justify the same creditor in having two claims filed against the same estate for the same indebtedness, even though one, in consequence of containing additional credits, should be of a less amount than the other.

DICKIE v. BLENKHERN.

Marine insurance—Premium note—When effectual as payment—Liability of part owner for share of premium.

W. H. P., acting for himself and co-owner of the barque "Calcutta," effected a policy of insurance upon the vessel, "for whom it may concern,"

with the Avon Marine Insurance Co., to whom he gave his promissory note for the premium. W. H. P. having become insolvent, his estate was purchased by the plaintiff, who, though the note, in fact, had not been paid, sued the defendant, as part owner of the vessel, for his proportion of the insurance premium, the form of action being for "money paid by the insolvent for the defendant at his request." Under the terms of the policy, in case of a loss, the company had power to deduct the amount of the note from the sum insured, or, in the event of the insolvency of the maker, to cancel the policy if the amount of the note was not secured to them within three days after notice to the maker, or any person interested in the policy.

Held, that to enable the plaintiff to recover he must prove that the note was accepted by the company in satisfaction and discharge of the premium to the same extent as if there had been an actual payment; that the creditor had taken upon himself the risk of the note being paid, and that the defendant's liability had become extinct, that in view of the stipulations of the policy such a condition was inadmissible as between the parties to the suit. The recital in the policy of the receipt of the premium might estop the company from denying such receipt, but could have no such effect as between the parties to the suit. As to them, it was nothing more than a piece of evidence to be considered in deciding the fact as to whether the plaintiff had proved such a payment of premium as to entitle him to recover a contribution from the defendant under a count per money paid.

Re EFFIE SWEET.

Assessment—Construction of Statute.

Chapter 21, Revised Statutes, 4th series, of County Assessment, section 17, enacts that three-fourths of the local taxation of counties "shall be levied and assessed upon the whole taxable real and personal property of the locality." Taxable personal property, for the purposes of the Act, is defined to include one-half the value of ships afloat "whether in this Province or elsewhere."

Held (on the authority of *Kenny v. The City of Halifax*, 3 S. C. R. 497), that a vessel, owned at Isaac's Harbour, Guysboro', but registered at the port of Halifax, was not liable to assessment as part of the personal property "of the locality" of Isaac's Harbour.

James, J., dissented.

[McDONALD, C.J., WEATHERBE AND RIGBY, JJ., 7TH NOVEMBER, 1882.]

ROSS v. HARRINGTON.

Wager—Recovery of money deposited—Right of one of several contributors—Plea to jurisdiction.

Plaintiff and several others made up a sum of money, contributing thereto in unequal proportions, which was deposited by plaintiff in the hands of defendant in connection with the "Hop Bitters" boat race, to be put up against a like sum to be furnished by a third party. Plaintiff, subsequently, demanded the repayment of the money deposited by him,

and, on defendant's failure to pay, brought an action in his own name for its recovery. At the time of the demand the money had not been paid over by defendant, and it did not appear that he had entered into any binding engagement to do so.

Held, that plaintiff was entitled to judgment, but, the money in question having been contributed by several individuals and not out of any joint fund, only for the sum contributed as his share.

The amount contributed by plaintiff was below the jurisdiction of the County Court from which the appeal was taken, but, in the absence of a plea to the jurisdiction, judgment was ordered to be entered below for that amount with costs. The judgment below was set aside with costs.

NEW BRUNSWICK

In the Supreme Court.

[APRIL, 1882.]

MAGNER v. HUTCHISON.

Executors—Penalty for not proving will—Excuse—Pleading.

In an action under the Rev. Stat. c. 136, s. 10, to recover the penalty for not proving a will in the Probate Court, the declaration stated the making of the will by M. and appointing the defendant executor, of which he had notice; that he did not prove it in the Probate Court or register it in the office of the Registrar of Probates for the county of N., where the deceased dwelt, or renounce the executorship within thirty days though he had no just excuse for the delay.

Pleas—1. That the defendant did prove and record the will in the Registrar's office of the County of N. where the deceased had last dwelt.

2. That after the death of M., the plaintiff, with the defendant's consent, took possession of all the personal property of M. and still had the use and enjoyment thereof, and that all the debts and funeral expenses being paid, the will was proved and recorded in the office of the Registrar of Deeds and wills for the County of N., wherein all M's real estate was situated, and that the plaintiff entered into the possession of and still possessed such real estate; wherefore the defendant did not prove the will in the Probate Court, or renounce the executorship thereof.

Held, on demurrer per Allen, C.J., Wetmore, Palmer and King, JJ. (Weldon, J., dissenting), that the pleas were bad; that the "Registrar" mentioned in cap. 136, s. 10, was the Registrar of Probates, and not the Registrar of Deeds.

Per Weldon, J., that the registry of the will in the office of the Registrar of Deeds was sufficient.

DOR DEM. ESTABROOKS v. TOWSE.

New trial—Perverse verdict.

Where the Judge on the trial of a cause told the jury there was no evidence on which they could find for the defendant, and they found a verdict for the defendant, the Court ordered a new trial without inquiring into the correctness of the verdict.

[MAY, 1882.]

KEENAN v. THE TRUSTEES OF THE LEINSTER STREET BAPTIST CHURCH, IN THE CITY OF ST. JOHN, *et al.**Joint action of tort—Costs of acquitted defendant—Time for taxing.*

An acquitted defendant in a joint action of tort is *prima facie* entitled to an aliquot portion of the joint costs, though all the defendants appeared by the same attorney and counsel, and pleaded jointly.

The acquitted defendant's costs should be taxed at the same time the plaintiff's costs are taxed.

LANTALUM v. THE ANCHOR MARINE INSURANCE CO.

Marine Insurance—Loss or damage—Matters in dispute—Arbitration clause—Ousting the Court of its jurisdiction—Pleading.

A policy of marine insurance provided (*inter alia*) for adjustment in case of loss and that payment would be made in sixty days after delivery at the office of the company of the usual proofs in writing of loss and interest in the insured, together with the adjustment papers; that if any difference arose between the company and the insured as to the loss or damage or any other matter relating to the insurance, arbitrators should be appointed; that the insured should not be entitled to maintain any action at law or suit in equity on the policy until the matters in dispute had been referred to the arbitrators so appointed; and that the obtaining of the decision of such arbitrators should be a condition precedent to the right of the insured to maintain any such action or suit. In an action on the policy the defendants pleaded that a difference had arisen between them and the plaintiff, as to the alleged loss or damage, and that although arbitrators had been appointed, they had not settled the matters in dispute nor made any award. To this the plaintiff replied that the defendants did not admit their liability under the policy, but wholly denied it. On demurrer to this replication, the question was whether the arbitration clause applied except where the company admitted a liability and only disputed the amount.

Held, that the replication was no answer to the plea, and that until the arbitrators determined the matters in difference referred to them, no action was maintainable.

MANITOBA.

In the Queen's Bench.

[WOOD, C.J., 15TH JULY, 1882.]

LIVINGSTON v. BETHUNE.

Specific performance—Homestead—42 Vict. cap. 31, sec. 34, sub-sec. 17 (D).

In a suit for specific performance of an agreement for sale of lands, the evidence showed that the defendant, the vendor, had duly made entry for a homestead right of one-half of the lands in question, and for the right of pre-emption of the other half. The defendant had resided upon and cultivated his homestead for upwards of a year, but had not obtained a patent therefor.

Held, that, although by 42 Vict. cap. 31, sec. 34, sub-sec. 17 (D.), there can be no assignment or transfer of a homestead right as such, yet there may be a contract for the sale of the lands and a patent to the homesteader or his vendor subsequently to be obtained from the Crown, both for the homestead and for the pre-empted land.

A decree was therefore made to take an account of the damages plaintiff had sustained by reason of the non-performance of the agreement by defendant and for payment of the same.

F. Beverly Robertson, for the plaintiff.

Killam, for the defendant,

[TRINITY TERM, 1882.]

MONTGOMERY *et al.* v. CHAMPION *et al.*

Sale of land—Statute of Frauds—Time—Vendor and purchaser.

On the 13th January, 1882, the plaintiffs bought from the defendants the south half of lot 12, in the Parish of Kildonan, and as evidence of the transaction took from the vendors the following memorandum:—"Winnipeg, January 13th, 1882. Received from Messrs. Montgomery, Barret, Horsman, Davis and Thompson, the sum of \$5,000, being part purchase money for south half of lot 12, in the Parish of Kildonan; the whole amount of said purchase money to be \$39,875, being at the rate of \$275 per acre for the lot, which contains one hundred and forty-five acres more or less. Terms of sale—\$12,000 to be secured by mortgage at 8 per cent. interest, balance cash in twenty days from date. (Signed) McKenzie and Lee, agents for Messrs. Trott and Mitchell, H. F. Champion and D. E. Sprague." On 28th January, plaintiffs, among other requisitions, called for the production of a patent to the outer two miles of the lot, and, this not being complied with at once, the plaintiffs, on 2nd February, the day

appointed to close the sale, wrote to defendants demanding a return of the deposit money, and, on the 4th February, notified the defendants' solicitors that if a good title were not furnished within five days, an action for the deposit would be commenced. The defendants were unable to comply with the requisition within the time specified, and on 13th February this suit was commenced to compel the return of the deposit. After action, and on 19th April defendants obtained the patent required.

Held, Wood, C.J., dissenting that the omission from the memorandum of the time when the mortgage for the balance should become payable, was not sufficient to avoid the contract, and that parol evidence was admissible.

Held, also, Wood, C.J., dissenting that time was not impliedly of the essence of the contract, and that the notice making it such was not sufficient, the time limited being too short.

Per Wood, C.J. A purchaser having paid the whole or part of his purchase money by way of deposit or otherwise, under a valid contract lawfully rescinded, or under a contract void within the Statute of Frauds, or under no contract, may immediately sue for and recover the money so paid.

Ewart, for plaintiffs.

Howell, for defendants.

THE
CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 30TH DECEMBER, 1882]

PHELPS v. THE CANADA SOUTHERN RAILWAY CO.

Railway company—Fire—Negligence.

A locomotive of the defendants' emitted sparks, apparently through broken meshes in the wire netting of the bonnet, which set fire to their freight shed, the floor of which was saturated with coal oil from handling therein leaky barrels of that material, and the wind carried the flames to the plaintiff's house and destroyed it. The jury found a verdict for the plaintiff.

Held, that the defendants were liable for the injury caused by the spreading of the fire from their freight house to the plaintiff's property.

Bethune, Q.C., for the plaintiff,

Crooks, Q.C., for the defendants.

LETT v. THE ST. LAWRENCE & OTTAWA RAILWAY CO.

Lord Campbell's Act—Death of wife—Husband's right of action for himself and children.

The plaintiff sued, under Lord Campbell's Act, on behalf of himself and children for the death of his wife, occasioned by the defendants. The wife

had some separate estate from which she derived an income, but the jury allowed no damages in respect thereof. It was not shown that the wife afforded any pecuniary assistance, either to the husband or his children. The jury found for the plaintiff, and apportioned the damages amongst the plaintiff and some of his children.

Held, Armour, J., dissenting, that the verdict was wrong; for the plaintiff was not entitled, either for himself or the children, to recover compensation for anything but pecuniary loss, or the loss of reasonable probability of pecuniary benefit.

Per Armour, J. The loss to be compensated is that of some benefit or advantage capable of being estimated in money, as distinguished from a *solatium* for wounded feelings and loss of companionship, and the loss to the husband of the wife's performance of her household duties, and to the children of a mother's education in religious morals and virtue, are both losses estimable by a jury.

McCarthy, Q.C., for the plaintiff.

Bethune, Q.C., for the defendants.

REGINA v. FORTIER.

THE SAME v. DAGGETT.

Lord's Day Act—Conveying travellers—Who are travellers.

The defendants, owner and captain respectively of a steamboat, advertised that they would carry excursionists on Sundays. A number of passengers left Buffalo, in the State of New York, on Sunday morning, and proceeded by rail to Niagara, whence they were carried by the defendants' steamboat to Toronto and back the same day, and the defendants were convicted therefor of a breach of R. S. O. cap. 189.

Held, that the passengers were travellers within the meaning of the exception in section 1 of the Act; that there is no distinction in such a case between travellers for pleasure and for business, and that the convictions were therefore bad.

Fenton, for the Crown.

Cattanach, for the defendants.

MURPHY v. THE GRAND TRUNK RAILWAY CO.

Railway—Fences—Gates—Non-repair—Accident.

The defendants' line of railway ran through the plaintiff's farm, and the plaintiff's mare escaped from a field adjoining the railway through a gate opposite a farm crossing which was out of repair, and was killed by the railway.

Held, that it was the duty of the defendants to keep the gate in repair and that they were liable for the plaintiff's loss.

Dunbar, for the plaintiff.

Barker, for the defendants.

WALTON v. WOODSTOCK GAS CO. *et al.**Recovery of land—Limitation of actions—Vacant land.*

On the 8th of April, 1854, the plaintiff acquired by conveyance the fee simple of a vacant piece of land, but did not enter. Shortly after, the W. etc., Railway Co. surveyed a portion of it, with other land required for their railway, and placed some stakes thereon, and the arbitrators to whom the matter was referred made an award in favour of the plaintiff, but the Railway Co. never took possession, nor exercised acts of ownership upon it, nor paid the price to the plaintiff, nor deposited their maps and plans. On 31st December, 1857, M. recovered judgment against the Railway Co., and, under proceedings in chancery, sold the interest of the Co. to the defendant P., who did not go into possession, though he went upon the land and examined the clay to see whether it was fit for making bricks. He did not fence it, but agreed with the adjoining proprietors to bear part of the expense in case they should put up fences. The defendant P., in 1875, sold the land to the defendant Co., who immediately went into possession and made valuable improvements. The Railway Co. and the defendants paid the taxes from 1853.

Held, Cameron, J., dissenting, that neither the Railway Co. nor the defendant P. ever had such a possession of the land as extinguished the title of the plaintiff, who was therefore entitled to recover the land.

Osler, Q.C., for the plaintiff.

Fletcher, for the defendants.

LOTT v. DRURY.

Slander—Imputation of insolvency—Actionable words—Non-suit.

The defendant spoke of the plaintiff, a miller and grain buyer, that one of the big millers (naming the plaintiff), had run away owing money to him and others, that he, the defendant, had come in to catch the plaintiff but that he had gone or cleared out. At the trial a non-suit was entered on the objection that the words were not proved to have been used with reference to the plaintiff's business, and no special damage was proved.

Held, that the non-suit was wrong, for the words used cast an imputation upon the solvency of the plaintiff, and, therefore, directly affected the plaintiff in his business.

Lount, Q.C., for the plaintiff.

McCarthy, Q.C., for the defendant.

FORRESTER v. THRASHER.

Insolvent Act of 1864—Assignment without assets—Discharge—Personal action.

In 1866, judgment was recovered against the defendant in this action for breach of promise of marriage and in another for seduction. The

defendant then made an assignment under the Insolvent Act of 1864, having no assets, and his only creditors being the plaintiffs in the two actions. No creditors appeared, and after the lapse of twelve months he petitioned for his discharge. The application was duly advertized, and no opposition being made he was discharged. He subsequently acquired some property, and execution was then issued in this action. The Master in Chambers refused to set the same aside on motion made by the defendant, and his order was reversed by Osler, J.

Held, affirming the decision of Osler, J., that the want of assets at the time of making the assignment could not be set up in this action as a ground for avoiding the discharge, but was a matter for the consideration of the Insolvent Court upon the application therefor, and that the same, unless attacked for fraud, was a complete answer to the plaintiffs' claim.

Held, also, that the plaintiff's claim was one which was barred by a discharge in insolvency.

Holman, for the plaintiff.

Clute, and *Aylesworth*, for the defendant.

TURNER v. LUCAS.

Preferential judgment—R. S. O. cap. 118.

The defendant, a creditor of O., who was in insolvent circumstances, commenced an action on the 25th May, 1882, and by collusion with O., who appeared, pleaded to the plaintiff's statement of claim and consented to an order striking out his defence, a judgment was obtained the next day. The plaintiff commenced proceedings immediately after the defendant, and having in due course obtained judgment against O., attacked the defendant's judgment.

Held, following the authorities under R. S. O. cap. 118, that the defendant's judgment was valid.

Mackelcan, Q.C., for the plaintiff.

Gibbons, for the defendant.

BELL v. RIDDELL AND WIFE.

Stifling prosecution for felony—Promissory note—Illegal consideration.

The male defendant was arrested on the charge of embezzling fines which he had received as a Justice of the Peace, on the information of the Reeve of the Township claiming the fines, who took the proceedings with a view to forcing the defendant into a settlement. He was brought before a Justice and committed for trial, and while under arrest pressure was

brought to bear upon him to compromise by giving security to procure his release, and the plaintiff, who professed to act on his behalf, gave a note to the Township for the amount claimed, and induced the defendant to give him a note for the amount endorsed by his wife. The note included the amount of the fines and also expenses incurred by the Township in an investigation of the defendant's alleged default, to which the latter was not a party. The defendant was then brought before the Deputy County Judge, but no evidence was offered, and it was stated that the affair had been settled, and that the charge would not be proceeded with, whereupon the defendant was discharged. The plaintiff paid his note to the Township, and now sought to recover upon defendants' note.

Held, that the consideration therefor, being the stifling of a prosecution for felony, was illegal and rendered the note void, and that the plaintiff was in no better position than the Township would have been had they taken the note.

Osler, Q.C., for the plaintiff.

Falconbridge, for the defendant.

PARSONS v. THE QUEEN INS. CO.

Fire Insurance—Statutory condition—Variation condition.

The plaintiff applied for an insurance upon his stock in trade with the defendant company. Pending negotiations the company's agent conversed with the plaintiff respecting the amount of gunpowder stored on the premises. He said he thought the company's condition was to allow 25 lbs. to be kept. Plaintiff said he did not keep more than 10 lbs., and had not more than that amount in stock. The insurance was then effected by an interim receipt and the next day a loss occurred. The plaintiff had more than 10 lbs. but less than 25 lbs. of powder in stock when the fire occurred. The statutory conditions prohibited more than 25 lbs. being kept in stock without permission, and the company's variation of this condition relieved them from liability, if more than 10 lbs. was "deposited on the premises, unless the same be specially allowed in the body of the policy, and suitable extra premium paid." The case, having been dealt with on other grounds on an appeal to the Privy Council, was remitted to this Court to try whether the variation was a just and reasonable one.

Held, Hagarty, C.J., dissenting, that under the circumstances of this case, inasmuch as the company's agent had represented that 25 lbs. of gunpowder was allowed to be kept in stock, the condition now insisted upon was not a just and reasonable one, and was therefore void, and that the plaintiff should recover.

Per Armour, J. The Act R. S. O. cap. 162,—passed for the purpose of securing uniformity of conditions upon fire policies, and setting out such conditions as it deemed proper to be inserted in every policy—showed that

the legislature believed such conditions to be just and reasonable for both insurers and insured, and therefore, that if any of the statutory conditions should be varied so as to increase the burden of it upon the insured, such variation would not be a just and reasonable one, within the meaning of the Act.

Per Hagarty, C.J., and Galt, J. The variation was a just and reasonable one.

Per Hagarty, C.J. The statutory condition exempting the company from liability, if more than 25 lbs. of powder were kept without permission, does not preclude or prohibit the insurers from bargaining that they will not be liable if more than 10 lbs. be kept, except on certain conditions as to extra premium, etc.

Crcelman, for the plaintiff.

Bethune, Q.C. and *Small*, for defendants.

HINTON v. ST. LAWRENCE & OTTAWA RAILWAY CO.

IETT v. THE SAME.

Railway—Negligence—Accident—Running on unauthorized track.

The defendant Company had laid three tracks upon a highway of the City of Ottawa, one of which had been laid without authority from the City, but had been used for a number of years, the City acquiescing, and the plans showing its existence were produced from their custody. This track diverged from the main track at the crossing of another street and ran nearer to the adjacent buildings, so that a person approaching by the cross street could not see an approaching train at as great a distance as if it were on the main track. The plaintiff H. and the wife of the plaintiff L. were struck by a passing train when driving across this track. The learned Judge at the trial refused to direct the jury that the third track was laid without authority and that its existence there was a wrongful act; but told them that the Company had no right to lay the rail, but that the question was whether the accident was caused by their negligence.

Held, that there was no misdirection, but that the existence of the third track was an element in considering the danger of the crossing, as it apparently increased the risk.

McCarthy, Q.C. for the plaintiff.

Bethune, Q.C., for the defendants.

REGINA v. PHIPPS.

Extradition—Ashburton Treaty—Forgery—Original warrant.

The prisoner was the superintendent of an almshouse in Philadelphia, Penn., which was supported by the city of Philadelphia. Certain persons furnished goods to the almshouse and were entitled to receive warrants from the almshouse for the price thereof. The warrants were duly prepared and signed, in favour of the parties entitled, in the hands of W., the secretary of the almshouse, to be delivered to the proper parties on their signing the counterfoils of the warrants. The prisoner obtained possession of the warrants by falsely representing to W. that he had authority to sign the names of the respective parties entitled and by signing such names on the counterfoils. The warrants were then cashed at the city treasury.

Held, Cameron, J., dissenting, that the offence amounted to forgery within the meaning of the Ashburton Treaty, and that the prisoner should be remanded for extradition.

Per Hagarty, C.J. The evidence disclosed a *prima facie* case of forgery sufficient to warrant the committment for trial of the prisoner if the crime had been committed in Canada.

Per Armour, J. The treaty was not intended to include the crime of forgery, only when that crime is common to both countries. In framing the treaty the high contracting parties were dealing with the then present and future, and the general term forgery should include everything in the nature of forgery, and which thereafter might be held to be forgery at common law by the decisions of the Courts, or might be declared to be forgery by the statute law.

Held, also, that the original warrant, within the meaning of 31 Vict. cap. 94, sec. 2 (D.), is not the first of two or more consecutive warrants, but is any warrant issued in the U. S. A.

MIDLAND RAILWAY CO. v. ONTARIO ROLLING MILLS CO.

Contract to deliver Iron—Cash as Delivered—Delivery of Part—Refusal of payment until whole delivered—Repudiation of contract—Counter claim—Damages for non-delivery of remainder.

The plaintiff agreed to deliver to the defendants 1,300 to 1,500 tons of old iron rails etc., "cash on delivery of each 100 tons, or with privilege of drawing against them as may agreed as between us, as they are shipped." On 17th February, 1880, the plaintiff, having delivered 1,150, sent an account of shipments and drew for \$1,500, which the defendants refused to accept on 21st February, erroneously asserting that two car loads, price \$333, had not been received, when in fact they had been received, as afterwards

acknowledged by them, and adding, "we think you should now deliver the balance due on contract before asking us to pay any more money. The time has so far gone by the date when we expected the whole amount, that we think it not unreasonable to ask this." There was a silence for some time, and on 5th June, 1880, the plaintiffs wrote, "We shall now soon be able to complete the delivery of old rails," and they went on to refer to another contemplated contract. In answer, the defendants' agents referred to the contemplated contract, but said nothing about the completion of the present one. In August, 1880, the plaintiffs again drew for the price of the amount delivered, which was refused acceptance for the same reasons as before. The plaintiffs sued for the price of the iron delivered, and the defendants counterclaimed for damages for the non-delivery of the difference between the iron delivered and 1,300 tons.

Held, Hagarty, C.J., dissenting, reversing the judgment of Osler, J., who tried the case, that the refusal of the defendants to pay for the iron, except upon delivery of the remainder, not amounting to such a repudiation of the terms of the contract as would have then entitled the plaintiffs to sue for breach thereof in not accepting the remaining 150 tons, did not absolve the plaintiffs from the delivery of the remainder; and that while the defendants were liable for the price of the amount delivered, they were entitled to judgment on their counterclaim for damages caused by failure of the plaintiffs to deliver the balance.

Kerr, Q.C., for the plaintiffs.

Osler, Q.C., for the defendants,

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 29TH DECEMBER, 1882.]

LONDON LOAN CO. v. SMITH.

Mortgage without covenant—Evidence of debt.

Held, that a mortgage which contains no covenant for repayment of the consideration money does not of itself afford evidence of a debt.

Gibbons, for the plaintiffs.

Meredith, Q.C., for the defendant.

MCGREGOR v. MCNEILL.

Agreement to cut timber—Chattels—Right to remove logs after time limited.

Under an agreement, dated 2nd October, 1880, the defendant sold to B. all the pine timber growing on certain lands, to be removed during the years 1880 and 1881. The timber was all cut into logs before the end of 1881, but a portion was not then removed.

Held, that this was a sale of goods and chattels, and not of an interest in land, and the timber so cut having become the plaintiff's property, he had the right to remove it after the expiration of the time mentioned.

R. Martin, Q.C., for the plaintiff.

Lount, Q.C., for the defendant.

DOYLE v. BELL.

Dominion Elections Act—Bribery—Civil remedy—Constitutionality.

Held, that section 109 of the Dominion Elections Act, 1874, 37 Vict. cap. 9, which gives a civil remedy for the recovery of the penalties imposed for the offences of bribery, etc., committed in contravention of section 92 of the Act, is not *ultra vires* of the Federal Parliament.

Osler, Q.C., for the plaintiff.

Bethune, Q.C., for the defendant.

GALLAGHER v. GLASS.

Assignment for benefit of Creditors—Trust to carry on business—Validity of.

An assignment in trust for creditors of a small stock of goods valued at about \$230 and a lot of land, made to a person not a creditor, and without consulting the creditors, contained a provision empowering the assignee to carry on the business and wind it up, no time being stated therefor; to pay all salaries, wages, etc., and all advances made in goods and money for conducting said business in the winding up thereof, and in his discretion to call a meeting of creditors, or otherwise to take their advice in the winding up; also to sell the land as to him should seem meet. On an interpleader issue between an execution creditor and the assignee,

Held, Wilson, C. J., dissenting, that the deed could not be supported.

Bartram, for the plaintiff.

Gibbons, for the defendant.

SEARS v. AGRICULTURAL INS. CO.

Insurance—Non-payment of premium note—Variation condition—Reformation—Reasonableness of condition.

A premium note dated 24th May, 1880, given on effecting an insurance with the defendant company, stated that the insured for value received in policy No. 1305, promised to pay the company \$14.15 on 24th December, 1880, with interest at 7 per cent., and contained an agreement that if the note were not paid at maturity the whole amount of the premium should be considered as earned, and the policy null and void so long as the note remained unpaid. Upon the policy which was dated 14th May, 1880, and took effect from 24th May, 1880, was endorsed a variation condition that the policy should not be valid or binding until the premium was actually paid, unless credit was given for it; in that case it was a condition of the contract, that if the premium was not paid ———, 18—, the whole amount of the premium should be considered as earned and the policy null and void so long as any part thereof remained unpaid. The application stated that the premium was due the 24th May, 1880.

Held, that the omission to fill in the blanks in the condition which was the same as section 48 of R. S. O. cap. 161, did not prevent its operating, for the condition would be perfect omitting the figures "18" altogether, but if necessary the condition could be reformed by inserting the words and figures evidently intended, viz: "24th May, —80."

Held, also, that the condition was not unreasonable.

The fire occurred on 13th September; on 15th September the plaintiff through a solicitor paid the amount of the note to the defendants who were ignorant of the loss. On the 17th May, 1881, notice and proof of loss were sent to the defendants, when they immediately re-paid the premium to the solicitor.

Held, that the payment having been made in fraud of the defendants could not avail the plaintiff.

G. M. Macdonnell, for the plaintiff.

Britton, Q. C., for the defendants.

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SMITH v. FORBES.

Broker—Order to buy Stock—Discretion—Ratification.

On Saturday, 25th March, the plaintiff instructed the defendants, by telegraph, to buy certain stock at 114 or less. The telegram was received too late to enable defendants to act that day. On the 27th they telegraphed

the plaintiff that they had cancelled his order in the meantime, as there were unfavourable rumours about the stocks, and that they would write. The plaintiff received this telegram on the same day about noon, did not answer it, but waited for the defendants' letter, which he received about 5 o'clock on the 28th. It was to the same effect as the telegram, and asked the plaintiff to repeat the order if he wished the defendants to act for him. The plaintiff replied by letter which, after acknowledging receipt of defendants' letter, stated that from their telegram he was prepared for something a good deal more tangible as a reason for not filling his order than the mere general unfavourable impression described in their letter, and that something more definite than suspicion had caused it, and therefore waited for the letter; that he thought he was justified in expecting the defendants to make good any decided advance; that he had given defendants a positive order to buy, knowing well that in the important decline that had taken place the air would be full of rumours and uncertainty, but having faith in the ultimate result he was willing to risk his money; that he had just telegraphed them as to how the market closed that day. The telegram stated that the letter was received; that he did not think defendants were justified in not buying, and asking, as intimated in his letter, how the market closed. The defendants, on 29th, telegraphed in reply, "last sale yesterday 120, market very uncertain."

Held, that the correspondence showed that the plaintiff ratified or assented to the defendants' course of conduct in disobeying his instructions and exercising their discretion, and that the construction of the correspondence was a matter for the Court and not for the jury; at all events no damage was proved, as the contract, if any, was broken on Monday, the 28th, when the stock was at 114. The plaintiff was, therefore, not entitled to recover.

Falconbridge, for the plaintiff.

McMichael, Q.C., for the defendants.

McNAB v. PEER.

Tax deed—Questioning within two years—Interested party—13 Eliz. cap. 5—Indigent debtors Act.

Under section 1 of 37 Vict. cap. 15 (O), a tax deed is valid and binding, unless questioned before a Court of competent jurisdiction within two years by a person interested.

One O., claiming under a sheriff's deed given on a sale under an execution against lands, and also under a deed from one M., filed a petition under the Quieting Titles Act within two years from the obtaining of a tax deed

by the plaintiff, who was contestant in the proceedings. The plaintiff filed his claim under the tax deed, but, on the opposition of O. afterwards withdrew and abandoned it, and an order was made by the Referee of titles barring his claim. Subsequently, an order was made by the Referee dismissing O's petition, which order was affirmed by a Judge on appeal. At the time the execution issued, under which O. purchased, one of the parties to the suit was dead, and the sheriff's deed, therefore, conveyed no interest; and the deed from M. to O. was a breach of trust by M. with O.'s knowledge.

Held, that O. was not a person interested within the meaning of the Act.

Held, also, that a deed of assignment of certain land in trust to pay certain creditors, and to pay over any surplus to the assignor, is not under 13 Eliz. cap. 5, a contrivance to defraud or defeat creditors; and that section 18 of the Indigent debtors Act, R.S.O. cap. 118, sec. 2, does not refer to real property.

Per Osler, J. The proceedings under the Quieting Titles Act were a questioning of the deed within the meaning of the 37 Vict. cap. 15.

Per Wilson, C. J. The proceedings had no such effect, as the questioning must be a successful questioning.

MacLennan, Q.C., for the plaintiff.

Leith, Q.C., for the defendant.

McLEAN v. GARLAND.

Assignment for creditors—Restriction to scheduled creditors—Validity.

A deed of assignment, after reciting that the assignor was indebted in sundry sums which he was unable to pay, and was desirous of making a fair and equal distribution of his property and effects amongst his creditors for the purpose of paying and satisfying rateably and proportionately, and without preference and priority, all his creditors their just debts, conveyed all his property to the plaintiff, a creditor in trust, to sell, and out of the proceeds to pay in full the several debts, etc. then due by the assignor to the plaintiff and the several other persons and firms "designated in the schedule annexed, marked B.," but if not sufficient for such purpose, then to distribute the assets rateably amongst such scheduled creditors.

Held, that the deed was void as against creditors, the trust being restricted to scheduled creditors.

A. C. Galt, for the plaintiff.

W. F. Walker, for the defendant.

UNION INSURANCE CO. v. FITZSIMMONS.

THE SAME v. SHIELDS.

Calls—Notice—Delivery of—Mailing—Assignment in insolvency—Receipt of dividend by insolvent—Stockholder—Business of insurance—License revoked—Receiver—Right to sue.

The 37 Vict. cap. 93, sec. 7 (O.), under the authority of which the calls were made which were sued for in these actions, provided that no call should be made for less than 10 per cent., and that 30 days notice of call should be given. The resolution passed for making the call was passed on 3rd August, 1881, the call to be payable on 6th September. Notice to the defendant F. was mailed in Toronto 5th August, and should have reached the post office at Ottawa, where F. lived, at 7 p.m. on the 6th. The Ottawa post office closed at 7.30 p.m., and the letter could not have been obtained by F. on that evening without personal application to the postmaster. F. received it on Monday the 8th August.

Held, Wilson, J., doubting, that under the statute the delivery must be deemed to have been made upon the mailing, and therefore that the notice was good.

The defendant S. objected that he was not a shareholder, because he had theretofore made an assignment under the Insolvent Act of 1875, and that he had not received notice of call. It appeared that the stock had not been returned by S. as part of his assets in the insolvency proceedings; the assignee had never accepted it; and the defendant subsequently received a dividend on it. It also appeared that the notice of call had been sent to the assignee, and that he had directed his book-keeper to forward it to S., which he stated he had done; the plaintiff's manager stated that after the call was made he spoke to S. about it, and he promised to pay it. The defendant denied having received the notice, and also the conversation with the manager.

Held, on the evidence that S. was still a stockholder and that he must be deemed to have had notice.

Held, also, that the objection to both cases was not a good one, that there was no power to sue because the company's license, under 42 Vict. cap. 25, had been revoked; for it was shown that one B. had been appointed receiver, and was specially required by the order of the Chancery Division to prosecute all members in arrear for calls; and that he had adopted these actions and was prosecuting them as receiver.

F. E. Hodgins, for the plaintiffs.

Falconbridge, for S.

C. R. W. Biggar, for F.

CHAPMAN v. SMITH.

Dismissing action—Non-suit on first trial—Failure to bring down for second trial—Rule 255.

Issue joined, 16th December, 1880. Non-suit entered at trial, 22nd December, 1880, by consent set aside and record again entered in March, 1881. Made a remanet, and struck out of docket by consent at ensuing assizes. After the Judicature Act came into force a motion to dismiss for want of prosecution was made, and the plaintiff's solicitors, though alleging that they did not intend to proceed, did not consent to the dismissal of the action. The Master in Chambers dismissed the action with costs and this order was reserved by Cameron, J.

Held, on appeal, reversing the order of Cameron, J., that under Rule 255 the Master's order was properly made; that the words "for the next sitting of the Court" were not confined to the first sitting after issue joined; and that the fact that the plaintiff had already taken his cause down to trial did not prevent the defendant from moving to dismiss for not going to trial again.

Holman, for the plaintiff.

G. H. Watson, for the defendant.

THE TOWNSHIP OF ANCASTER v. DURAND.

Tolls—Demise of right to levy—By-Law—Tollgate outside the Township limits.

Held, that the plaintiff municipality had the right to demise to the defendant D. the right to levy tolls upon one of the township roads, and that under the circumstances of this case the fact that the toll-gate was on the Barton side of the road (Barton and Ancaster being adjoining townships), was no objection to the demise.

Held also, that though there should have been either a general or special by-law for the purpose of authorizing the demise, the defendant could not raise the objection for the first time in his notice of motion to set aside a verdict for the purchase money payable under the demise entered for the plaintiffs against the lessee of the tolls and his sureties.

Osler, Q.C., for the plaintiff.

Mackelcan, Q.C., for the defendants.

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MARRIED WOMEN'S RIGHTS OF PROPERTY.

THERE are few facts more noteworthy in modern society than the elevation in the social scale which the female portion of the community has attained. To Christianity in the first place is mainly due this remarkable change in the social status of women; and to this is also in some measure to be attributed, as well as to the growing refinement of manners, the increased respect which is paid to the demand of women to be released from the burthens and disabilities which are laid upon them as the legacy of a ruder age.

It is doubtful, however, whether the recent legislative emancipation of the property of married women from marital control is altogether due to a disinterested desire on the part of men to do justice to the weaker sex. Man is at best a selfish animal, and it is to be feared, that even in this apparently disinterested legislation, he has had an eye to the casual advantages which may accrue to his own sex from its adoption.

Modern civilization, with all its rush and turmoil is a very different thing to the quiet plodding methodical stay-at-home-days which have gone by. The ups and downs of life are more numerous and the shock is often all the ruder, by reason of the increased altitude from which it is possible to fall.

Men who to-day are rolling in wealth, by a sudden turn in the wheel may find themselves to-morrow almost penniless. It is very obvious that a reverse of fortune of this kind comes doubly hard on women and children reared in the lap of luxury, often without the knowledge or ability to earn their bread by honest toil, no matter how willing they may be to make the attempt. And even in less extreme cases, no man having attained a reasonable share of the comforts of modern life can very willingly give them up, merely because a capricious fortune has converted a credit balance at his banker's to a debit.

In the wife's separate rights of property therefore man beholds a sheet anchor which may prove useful in such stormy weather, and instead of every vestige not only of his own property, but also all that has come to him in right of his wife, being swept into the vortex into which an ill-fortune may possibly drift him, he not unreasonably hopes by securing to his wife her own property free from the demands of his creditors to be able to find a refuge in the storm, and an opportunity thereby to make a new start at better advantage than he otherwise would. .

This, or some such reasoning, though not publicly expressed, we believe to have had an important influence in the adoption of the modern legislation as to married women's rights of property.

A priori it might be thought it would not be very difficult to frame a statute on such a subject which would accomplish all that was desired and at the same time be perfectly intelligible. But it must be confessed that there are few branches of law which are involved in more doubt than that embraced in the modern statute law relating to married women. Before the statutes to which we refer were enacted, the rights of husbands and wives in their respective properties were pretty generally understood, not only by the legal profession whose business it was to comprehend them, but also by the community at large. But the result of the legislation to which we refer is that neither one class nor the other can be said to understand how the law stands.

The rights of married women to their personalty, their rights to their realty, their rights and liabilities on their contracts, and for their torts, their rights to sue, whether alone, or by next friend, their liability to be sued alone, or with their husband, all are involved in more or less doubt and confusion. The Legislature seem to have endeavoured to make the *feme covert*, so far as rights of property are concerned a *feme sole*, while the judicial decisions seem to establish that they have only succeeded in making her a sort of a hybrid animal, a little of both, and yet neither one nor the other.

Mr. Justice Armour, in his very able judgment in *Clarke v. Creighton* (a), strikingly presents the somewhat peculiar results of the judicial construction of the section nine Ontario Act (b). The latter clause of that section provides that "any married woman may be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts or torts, *as if she were unmarried.*" The learned Judge thus sums up the effect of the decisions: "That when the Legislature there said that 'any married woman' might be sued or proceeded against, it did not intend that any married woman might be sued or proceeded against, but only that any married woman who had separate estate, and that separate estate only of a particular quality might be sued or proceeded against; nor did it intend that any woman so having such separate estate of such a particular quality might be sued or proceeded against, but only that such separate estate of such a particular quality might be proceeded against; and that where the Legislature used the words 'as if she were unmarried,' it did not intend to use those words, and that the section should be read as if they were struck out." This is a perfectly fair and legitimate criticism of the decisions referred to, and the result is certainly curious, and it would seem to show that where the Legislature uses the words "married woman" it means "goods and chattels,

(a) 45 U. C. R. 514.

35 Vict. cap. 16, sec. 9 (now R. S. O. cap. 125 s. 20).

lands and tenements" of a particular kind and description. This is not complimentary to the fair sex, and we are sure the Legislature would never have been so ungallant, if it could only have known how its words would have been judicially construed. We had almost said misconstrued.

The fact is, however, that the fault which has run through all the legislation on this subject, is either a timidity on the part of the draughtsman rendering him fearful of going too far, or else a lack of appreciation on his part of the legislative enactments necessary to displace effectually the already existing rules and principles of law applicable to the subject.

At an early period Draper, C.J., laid down the rule that Acts of this kind are not to be construed to alter the common law, except as far as is absolutely necessary to give full effect to their provisions, *Kraemer v. Gless* (c); and the operation of that canon of construction has sensibly affected most of the later decisions. And the words of the Act which appear to be in themselves amply wide, have received in the process of judicial construction so restricted a meaning that it may reasonably be doubted whether the real intention of the Legislature has been accomplished by them.

Some Judges have attempted to give a more liberal construction to the Act, but although their opinions appear to be overruled, the result is nevertheless anything but satisfactory, and doubt reigns where there ought to be certainty. For instance, take the simple question, whether or not the husband is a necessary party to a conveyance by his wife of land held by her as her separate property (d), and we find it open to doubt. On the one hand there is the decision of Proudfoot, V.C., in *Boustead v. Whitmore* (e), that the wife may convey alone, and there is the dictum of the same learned Judge to the same effect in *Adams v. Loomis* (f). On the other hand there is the earlier decision of

(c) 10 C. P. 470.

(d) R S. O. cap. 125 secs. 3 and 4.

(e) 22 Gr. 222.

(f) 24 Gr. 243.

Wilson, J., in *Ogden v. McArthur* (g), the dictum of the same learned Judge in *Berry v. Zeiss* (h), and also that of Patterson, J. A., in *Lawson v. Laidlaw* (i), expressly affirming the opinion of Spragge, V.C., on this point in *Royal Canadian Bank v. Mitchell* (j), and also the observation of the same learned Judge in *Horner v. Kerr* (k) to the contrary. We believe that the constant practice of the profession is to join the husband as a party, notwithstanding the contrary views of its necessity to which we have referred. At the same time it is very obvious that should such a question arise in the investigation of a title it would be a matter of some difficulty to advise a client to stand a suit for specific performance on such a point.

In the head note to *Boustead v. Whitmore* (*supra*) it is said, "in a proceeding against a married woman to obtain a conveyance of property vested in her it is not necessary to join her husband as a party." But we do not think this is by any means a necessary deduction from the point actually decided, which was that where the husband is an insolvent, and his assignee brings a suit to recover lands of the insolvent which were vested in his wife; that in such a case it is not necessary to join the husband as a party. But if the fact of insolvency had not existed, it does not follow that the husband would not have been a necessary party. This decision is also open to question from the fact that it is based, as appears by the judgment at p. 225, on the assumption that the 35 Vict. cap. 16, had deprived the husband of all interest in his wife's estate. But this assumption was afterwards held to be incorrect by the Court of Appeal in *Furness v. Mitchell* (l), and this latter opinion was subsequently ratified by the Legislature by 40 Vict. cap. 7, Schedule A. The weight of authority would

(g) 36 U C. R. 246.

(h) 32 C. P. 236.

(i) 3 App. R. 91.

(j) 14 Gr. 412.

(k) 6 App R. 38.

(l) 3 App. R. 510.

therefore seem to be in favour of the views of Wilson, J., and Patterson, J. A., and the practice of the profession.

The cases of *Adams v. Loomis* (*supra*) and *Sanders v. Malsburg* (*m*), do not necessarily conflict with *Ogden v. McArthur*, because the estate of the wife in question in those cases was not merely "the modified separate estate which is the offspring of the statutory law," as the learned Chancellor expresses it, but had become by the act of the parties separate estate within the meaning of that term, as understood by Courts of Equity prior to the Married Women's Property Acts, and over which the wife had a power of alienation without the concurrence of her husband, and which she might, as an exception to the rules of the Common Law, convey to her husband direct, so far as the equitable title was concerned, without the medium of a trustee. See *Taylor v. Meads* (*n*), *Pride v. Bubb* (*o*). In *Lawson v. Laidlaw*, Patterson, J. A., expressed the opinion that there is no difference between property expressly settled to a married woman's separate use, and property held by her under the statute, an opinion however opposed to the judgment in *Royal Canadian Bank v. Mitchell*, and also of the present Chancellor, as expressed in *Sanders v. Malsburg*.

And here it might be convenient to notice another point which the case of *Sanders v. Malsburg* incidentally suggests, and that is the effect of the Judicature Act on legal as distinguished from equitable estates. The 17th section of the Act, sub-sec. 10 provides that "in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of Equity and the rules of the Common Law with reference to the same matter the rules of Equity shall prevail." In *Sanders v. Malsburg* the wife had acquired certain lands which the Court held were by virtue of a marriage settlement existing between her and her husband, held by her as separate estate; these

(*m*) 1 Ont. R. 178; 2 C. L. T. 307.

(*n*) 13 W. R. 394.

(*o*) L. R. 7 Chy. 64.

lands she conveyed direct to her husband, who afterwards conveyed to the plaintiff; the wife having died the action was brought to obtain a declaration that the heirs at law of the deceased wife were trustees for the plaintiff of the legal estate. The judgment granted the relief prayed. At law a conveyance by a wife direct to her husband would be entirely inoperative; in equity the rule was that it conveyed the beneficial interest in the land, provided the estate conveyed were separate estate over which she had a power of alienation; here there was a conflict between the rules of law and equity.

In *Hall v. Waterhouse* (p), it was held that a married woman in whom was vested the legal estate of land which she was entitled to hold to her separate use, might devise the land so as to pass the equitable fee without her husband's concurrence, but it would seem from that case that in order to convey the legal estate it would be necessary that her husband must concur. The decision in *Sanders v. Malsburg* appears to be based on the same view of the law, viz., that the conveyance by the wife to her husband did not divest her of the legal estate, but had simply the effect of a declaration of trust, or a conveyance of the equitable fee, and that on her death the legal estate descended to her heirs at law. If the conveyance by the wife to her husband had been effectual to convey the legal as well as the equitable title, the relief claimed could not have been granted, and the action must have been dismissed.

The decision of the case of *Sanders v. Malsburg*, though this question was not expressly considered, seems to point to the conclusion that the effect of the Judicature Act is not utterly to abrogate the rules of law whenever they conflict with the rules of equity, and not to convert equitable into legal estates, but merely to make it incumbent on the Court to determine questions presented for adjudication, according to the principles of equity, and to give the same relief as in like cases a Court of Equity would have given before the Judicature Act came into operation (q).

(p) 13 W. R. 633; 11 Jur. N. S. 361.

(q) See, however, *Walsh v. Lonsdale*, L. R. 21 Chy. Div. 9; 46 L. T.

In the recent case of *Re Kent & Smith (r)*, the converse proposition of that in *Sanders v. Malsburg* seems to have come up for consideration, viz., the effect of a conveyance by a husband direct to his wife; and the learned Chancellor without deciding positively that an equitable estate actually passed to the wife by the deed, nevertheless held the title of the husband, if any, after making such a conveyance was clearly of too doubtful a character to be forced on an unwilling purchaser.

A married woman's power of disposition over her personal property held under the statute other than her personal earnings, is also the subject of doubt and uncertainty.

At Common Law, marriage operated as an absolute gift in law to the husband, of all the goods and chattels and personal property of the wife. It became liable for his debts, and he might have disposed of it without her consent. In some cases it has been said that the effect of the *Married Women's Property Acts* is to create a statutory settlement, and that by that settlement the wife is simply enabled to hold and enjoy her personalty as her separate property freed from her husband's debts, and so that he cannot dispose of it without her consent, but it is said the statute does not enable her to dispose of it without his consent, and in that respect differs from a settlement *inter partes*.

To this effect are the cases of *Royal Canadian Bank v. Mitchell (s)*, *Balsam v. Robinson (t)*, *McGuire v. McGuire (u)*, *Mitchell v. Weir (v)*, *Kraemer v. Gless (w)*, *Lett v. Commercial Bank (x)*. On the other hand there are strong expressions of opinion to the contrary to be found in the judgment of

858, per Sir George Jessel, M.R., and a discussion of the corresponding section in the English Act in the *Law Times* of 30th December, 1882, at p. 153. And compare *Saylor v. Cooper*, 2 C. L. T. 354.

(r) 2 C. L. T. 304.

(s) 14 Gr. 412.

(t) 19 C. P. 263.

(u) 23 C. P. 123.

(v) 19 Gr. 568.

(w) 10 C. P. 470.

(x) 24 U. C. R. 552.

Mowat, V.C., in *Chamberlain v. McDonald* (y), of Wilson, J., in *Wright v. Garden* (z), and of Patterson, J.A., in *Lawson v. Laidlaw* (a).

But the question whether or not a married woman may without her husband's concurrence effectually dispose of her personal property which she is entitled to hold to her separate use under the statute did not in the opinion of the Court really present itself for adjudication in the latter case. That was an action on a promissory note made a wife having an interest in a sum of money as separate property under the statute, and the observations of the learned Judge who delivered the judgment of the Court as to the effect of a married woman's contracts upon her land apply with equal force to her personal property. He says, at page 91, "It is true that the concurrence of the husband is still necessary in a conveyance (*i. e.* of land), but as the debt creates no charge or lien, and affects no specific portion of land, although its effect may be to lead to a sale of all, the law respecting conveyances appears to me inapplicable." From this it would seem that the question of the defendant's liability on the note was not, at all events in the opinion of the Court, dependent on the question whether or not her husband's consent was necessary to a valid disposition of her separate personal property held under the statute, or to the creation of a specific charge thereon. If this be so, and assuming for the moment that the *jus disponendi* is an incident of separate estate in equity, the first and third propositions stated in *Lawson v. Laidlaw*, at page 90, to the effect that "personal property enjoyed by a married woman under the statutes of 1858 and 1872, is her separate property at law to the same extent and with the *same incidents* as property settled to her separate use was and is in equity, and that she may charge or convey her separate personal estate as a *feme sole*," can hardly be said to have been necessary for the decision of that case, and cannot therefore be said to have the force of a judicial

(y) 14 Gr. 447.

(z) 28 U. C. R. 624.

(a) 3 App. R. 90.

ination of the question ; opposed as they are to the decisions and equally strong *dicta* of other learned to the contrary, some of which do not appear to been considered by the learned Justice of Appeal. propositions were said by the learned Judge to be on the conclusions arrived at in the case of *Field v. Cur (b)*, but an examination of that case, we think, disclose any opinion or conclusion at variance with arrived at in the earlier case of *McGuire v. McGuire* the same Court.

he *Royal Canadian Bank v. Mitchell (c)*, it was ined that as the wife had no *jus disponendi*, without sband's concurrence, over her real estate, she there- ald not bind it by any contract made by her, but the of Appeal while apparently admitting that the *jus ndi* was not conferred, arrived at the conclusion that y held under the statute might nevertheless be lly charged by a contract made by her. The point n judgment in the *Royal Canadian Bank v. Mitchell* erefore now be considered as virtually overruled by i v. *Laidlaw (d)*. For although Patterson, J.A., is to point out that the separate property sought to rged in the former case was real estate, and in the personal estate, he nevertheless admits that the le of the decision is equally applicable to both. 91).

case of the *Royal Canadian Bank v. Mitchell* was er practically dissented from in *Kerr v. Stripp (e)*, gh it does not seem to have been referred to, either argament or judgment ; and see also *Kerr v. Stripp* azee v. *McFarland (g)*.

judgment in *Lawson v. Laidlaw*, however, it must fessed is somewhat difficult to reconcile with itself.

C. P. 15.

Gr. 412.

App. R. 77.

Gr 198.

U. C. R. 121.

U. C. R. 281.

For admitting, as it seems to do, that the *jus disponendi* is an element wanting in the wife, as regards her property held under the statute, and admitting also, as it seems to do, that she can only charge by her contracts property over which she has an absolute power of disposition without her husband's concurrence, and admitting further that she cannot do indirectly what she cannot do directly, it nevertheless reaches the conclusion, that a promissory note made by her, may nevertheless be binding on property over which she has not an absolute *jus disponendi* without her husband's consent. With the result we do not quarrel, although we confess there seems to be a defect in the logic by which it is reached.

The recent case of *O'Doherty v. The Ontario Bank* (h), appears to turn on the fact that the property in question had become by the act of the parties separate estate in equity, and was therefore not dependent on the statutory settlement; it therefore does not afford any assistance in the solution of the question we are considering.

There is another point worthy of noting, and that is the effect of marriage settlements on the operation of the Statute.

We are inclined to think that the difference which the statute apparently makes in the effect of the existence of a marriage settlement, upon the rights of married women in real and personal estate, is neither wise nor necessary. On the contrary, we think it rather tends to complicate the law without any sufficient reason.

When dealing with Acts of this kind we have found by experience that "things are not always what they seem." Without, therefore, wishing to be dogmatic, we would deferentially submit, subject to the future light which may be thrown on the matter by judicial construction, that the effect of the Ontario Statute is this: That where an antenuptial settlement exists between a husband and wife, married before the 2nd March, 1872, then the statute has no operation on the real estate of the wife, and her rights

(h) 32 C. P. 285.

and those of her husband in her realty, remain as at common law. Where an ante-nuptial settlement, however, exists between husband and wife, married since the 2nd March, 1872, then the separate rights of property conferred by the Act, take effect as to all her *real estate* "without prejudice, and subject to the trusts of any settlement affecting the same."

But with regard to *personal estate* the rule appears to be quite different, and, no matter when the marriage may have taken place, the existence of an ante-nuptial settlement will prevent the operation of the statute altogether as regards the wife's personalty, whether the settlement affect the personalty or not (see R. S. O. cap. 125, ss. 1, 5); at least that appears to us to be the proper construction of the statute, in the absence of any authority on the point. As regards both real and personal estate, in order to exclude the operation of the statute, the settlement must be *ante-nuptial*. A post-nuptial settlement will only affect property actually affected thereby, but will not otherwise exclude the operation of the statute.

There is another branch of the law relating to married women which can hardly be said to be in a satisfactory condition either, and that is that relating to their liability for their contracts and their torts. As to their contracts it seems tolerably well settled, that, notwithstanding the Married Women's Property Acts, no married woman can enter into a contract which will be binding on her individually; the utmost she is enabled to do is to render any separate property then owned by her liable. In order, therefore, to recover against a married woman upon a contract made by her, it is necessary, wherever coverture is set up as a defence, to allege in the pleadings and to prove that she had at the time of the contract and still has separate estate liable for the satisfaction of the debt, and it is only against such property and not against the married women personally, that judgment can be recovered (i). The

(i) *Consolidated Bank v. Henderson*, 29 C. P. 549; *Kerr v. Stripp*, 24 Gr. 198; *Pike v. Fitzgibbon*, 17 Chy. Div. 454; *Picard v. Hime*, L. R. 5 Chy. 278; *Lawson v. Laidlaw*, 3 App. R. 91.

judgment is a judgment *in rem* and not a judgment *in personam*. And in *Davis v. Ballenden* (j), a judgment on default of appearance entered against a married woman personally, in an action on a promissory note, was set aside as irregular; and in G—— v. R—— (k), a mortgage suit, Proudfoot, J. refused to make a personal order against a married woman for payment of a mortgage debt by her, there being no allegation of separate estate in the bill of complaint. Another view expressed by some learned Judges, and attempted to be acted on, but which has been overborne by the weight of adverse authority was this, that the judgment against a married woman, upon any contract made by her, should be personal, just as one recovered against her lord and master, and that questions touching the liability of property to satisfy such judgment should be disposed of upon an interpleader issue, or other proceeding of a kindred nature. This view, we confess, seems more consonant with common sense and the fitness of things, and it is to be regretted, we think, that it did not prevail.

According to the decision in *Lawson v. Laidlaw*, however, strengthened no doubt as it is by that of the English Court of Appeal, in *Pike v. Fitzgibbon* (l), the only separate property of a married woman which can be made answerable for her contracts is that which she had at the time the contract was made, and which she still has when judgment is recovered against her. All property acquired by her subsequently to the making of the contract being exempt from liability; and even property in which she has a vested estate in remainder in fee expectant on the death of her husband, cannot, it seems, even on her husband's death be made liable for contracts made by her during his lifetime (m); and it is also to be noted that prior to judgment no order can be obtained restraining a married woman from alienating her separate property *pendente lite* (n).

(j) 46 L. T. 797.

(k) 9 P. R. 174; 1 C. L. T. 730, *sub. nom.* *Anonymous*.

(l) 17 Ch. D. 454.

(m) *Standard Bank v. Boulton*, 3 App. R. 93; *Field v. McArthur*, 27 C. P. 15.

(n) *National Provincial Bank of England v. Thomas*, 24 W. R. 1013;

The result of the present state of the law in Ontario is simply to enable married women to commit frauds with impunity, provided they can get any one foolish enough to deal with them. For it is clear that there is nothing to prevent a married woman from entering into a contract upon the faith of having separate estate sufficient to answer it, and immediately afterwards disposing of the whole of it, with the satisfaction of knowing that both herself individually, and any property she may afterwards acquire, will be free from liability for the debt so incurred. It will be, no doubt, an interesting subject of enquiry hereafter, whether the proceeds of the sale of property are the same as the property from which it is derived, or whether the proceeds are to be deemed a new acquisition, also whether property which is acquired by means of the proceeds of the sale of other property can be held to be legally "the same property" as that from which the purchase money was originally derived. If it be not, the case of the creditors of married women is indeed unenviable, and it is difficult to see how a judgment against a married woman, could ever be recovered, much less enforced. For, unless the creditor is prepared to allege and prove that the married woman has property which is liable for his debt he must be non-suited. See *Field v. McArthur* (o), where the rule was made absolute for a non-suit, as appears by the judgments, notwithstanding it is said at the end of the report "rule discharged."

Both the form of the judgment against married women and the restrictions as to the property against which it can be enforced, are obviously objectionable for the reasons already suggested. The decisions which have produced this result, seem to throw around the married woman and her property a protection which we do not think could have been contemplated by the Legislature, and which indeed seems somewhat opposed to its letter as already pointed out in the passage cited from the judgment of Armour, J., in *Clarke v. Creighton*.

and see *Owens v. Dickenson*, Cr. & Ph. 48; *Johnson v. Gallagher*, 3 D. F. & J. 494; 7 Jur. N. S. 273. See also, *Turner v. Smith*, 1 C. L. T. 560.

(o) 27 C. P. 15.

The supposition that the Act intended to exempt the married woman from personal liability, or rather not to impose any such liability upon her, in respect of her contracts seems to have more to be said in its favour than the other proposition which exempts after acquired property from liability; this latter proposition rests, we think, upon an exceedingly artificial method of reasoning very difficult to be reconciled with common sense.

If acts of the kind we are discussing are not to be "a delusion and a snare," they should certainly be framed so as to enable married women entering into contracts to bind not only the separate property they may have at the time of the contract, but also any separate property which they may at any time thereafter acquire. And if the present statute law is not sufficient for that purpose, then it is obviously necessary that it should be amended so that it may be made so.

This restricted liability of a married woman's property to answer her contracts, has been even supposed to exist with regard to her *torts*, as though when a woman slanders her neighbour the liability of her property to answer in damages must depend on a supposed intention on her part to charge her separate estate with the consequences, (see per Armour, J., in *Clarke v. Creighton*), but it would seem that the present Chancellor, at all events, does not feel himself bound by any such narrow construction of the Act, as in the recent case of *Barker v. Westover* (*p*), we find that he awarded judgment against the married woman personally for the amount found due in respect of a *tort* committed by her.

And it is doubtful whether the decision in the case of *Stone v. Knapp* (*p*), if it ever comes to be considered in appeal would not need to be revised. In that case it was held that no additional liability for *torts* was created by the Act, and that a married woman cannot now be made liable for any *tort* for which an action could not formerly

(o) 3 C. L. T. 35.

(p) 29 C. P. 605.

have been maintained against her jointly with her husband, and that the only change the Act has made is to enable her to be sued alone. The *tort* there complained of, was an alleged fraudulent representation by the married woman, that she was authorised to pledge her husband's credit for goods for her daughter's wedding outfit, and the Court held that that being a *tort* for which an action would not have been maintainable against her jointly with her husband, it was therefore one for which no action could now be maintained against the wife alone.

In England an Act has recently been passed (45 & 46 Vict. cap. 75), for the purpose of remedying some of the anomalies to which we have adverted in the course of this article. It purports to give to women married after the Act comes into force full and absolute control over their property, and to give them not merely the power to hold and enjoy, but also to dispose of it. It also purports to render after acquired property liable for their contracts. But while expressly enabling a married woman to enter into contracts, it still appears to limit her liability thereon "to the extent of her separate estate." In view of the decisions upon our own statutes, it is difficult to say how far the Act in question will be found to effectuate the object apparently in view, as experience leads us to believe that until such legislation has been submitted to the judicial scalpel, it is somewhat presumptuous to express any opinion as to its real, as distinguished from its apparent effect.

GEO. S. HOLMESTED.

EDITORIAL REVIEW.

"Justice in Manitoba."

Mr. Biggs is a gentleman of some reputation at the Bar, having studied under two men who became Chief Justices, and become nephew by marriage to a third. But yearning for greater fame, he poses as a statistician in an article under the above caption in a Winnipeg newspaper, of which he sends us a copy. Mr. Biggs would have his readers believe that Manitoba has nearly twice the litigation that there is in Ontario, and that her three Judges do more work than Ontario's thirteen. His figures are as follows:—

Writs issued from Osgoode Hall from 1st January,	
to 6th December, 1882.....	1780
As against this there were writs issued during same	
period in Manitoba	2904
	<hr/>
Balance in favour of Manitoba	1174

Mr. Biggs then details some of the work done by the Ontario Judges, and all of that done by the Manitoba Judges, and brings out a balance again in favour of Manitoba. So far as the above figures go, they are perfectly correct, but they require a little explanation to any one not acquainted with the fact that Osgoode Hall and Ontario are not synonymous terms.

The writs issued from Osgoode Hall are, in other words, the writs issued in the County of York. Mr. Biggs' figures, therefore, when interpreted, show that the County of York in this Province alone issues a good many more than half as many writs as the whole Province of Manitoba. We have taken the trouble to ascertain as nearly as possible

the number of writs issued in the thirty-six other counties of Ontario, which Mr. Biggs has overlooked. Our returns are incomplete, though we have heard from most of the counties; and we extend our thanks to the local registrars and deputy clerks who so promptly and courteously gave us the information. Three counties we have not heard from at all. From some other counties we have the number of writs issued in the Common Law Divisions only; but the figures we have obtained are quite sufficient for our present purpose. We have not space for an extended report, showing the writs from each county, but the total number from thirty-three counties, excluding York, is 4089. We think we may with safety say that there are over 6000 writs issued in Ontario in a year. We do not take into account the space of time between Mr. Biggs' 6th December and the end of the year. There is less harm done by that omission than by leaving out thirty-six counties out of thirty-seven. Of the 4089 actions above mentioned 985 went to trial. In the County of York, there are four assizes every year, at which there are at least 300 cases tried, and two Chancery Division Sittings, at which there are probably 150 cases.

It must be remembered that the number of writs issued does not by any means indicate the amount of litigation. With few exceptions all administration and partition matters are commenced by summary application for an order, and applications under the Vendors and Purchasers Act take the place of many specific performance suits. In addition to this, we might state for Mr. Biggs' information, that the Chancery Judges are regularly engaged in holding Chambers one day in the week, and Court three days, excluding special trials which not infrequently occur. And two days in the week are set apart on the common law side at Osgoode Hall for holding Court and Judges' Chambers. In addition to the Sittings of the full Divisional Courts, the Judges of the High Court do occasional duty in the Court of Appeal, which is now so overburdened with work that we understand measures are being proposed to relieve it. Of the criminal business, we have no statistics, but if the

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balance of crime is in favour of Manitoba we have no desire to disturb it.

There are less dangerous pastimes than playing with statistics, and we advise Mr. Biggs to try some of them.

Jurisdiction of a County Court Judge without his own County.

His Honour Judge Burnham, Judge of the County Court of the County of Ontario, assisted in holding the late County Court sittings of the County of York. No objection was made to his jurisdiction to try cases outside of his own county, so far as we are aware. But it is not a matter so entirely free from doubt as to be dismissed without discussion. By C. S. U. C. cap. 15, sec. 1, there shall be a County Court in every county or union of counties. By sec. 2, a Judge is to be appointed in each of the said Courts; and by sec. 9 he is to take oath that he will truly, etc., perform the duties of Judge of the County Court to which he has been appointed.

R. S. O. cap. 42, sec. 13, is the statutory authority under which County Court Judges act outside their own counties. By that section it is enacted, that "it shall be the duty of a County Court Judge to hold any of the Courts in any county other than his own, or to perform any other duty of a County Court Judge in any county, upon being required so to do by an order of the Governor-General, made at the request of the Lieutenant-Governor; or, without any such order, the Judge in any county may, if he sees fit, perform any judicial duties in any county other than his own, on being requested to do so by the Judge to whom the duty for any reason belongs." The latter part of this section seems objectionable. By the B. N. A. Act, sec. 96, the Governor-General shall appoint the Judges of the County Courts. *Re Squier*, 46 U. C. R. 474; 2 C. L. T. 100, shows that the Provincial Legislatures have no power over the tenures of the Judges. They are amenable to the Parliament of Canada, and are personally beyond the control of the Local Legislatures. They must perform all the duties assigned to the Courts to which they are appointed, and

the Provincial Legislatures have power to vary such duties by varying the functions of the Courts. But whenever a County Court Judge, under the Ontario Statutes, acts as Judge of a Court to which his commission does not extend, he acts either as the appointee of the Ontario Legislature, or of the Judge of the Court in which he sits. Now, that the Judge of the Court in which he sits cannot give him jurisdiction, goes without saying. And the appointment by the Provincial Legislature of a Judge of a County Court, in whatever form it may appear, seems to be a direct violation of the constitution, which requires that these Courts shall be filled by the appointees of the Governor-General. If the Provincial Legislature claims the right to appoint a Judge in an emergency, it must be because the power to make such an appointment rested in it before the emergency occurred. And it plainly does not. The point is an interesting as well as an important one, and will, no doubt, shortly arise for decision.

Changes in the Judiciary.

The Honourable Lewis Wallbridge, Q.C., has been appointed to the Chief Justiceship of Manitoba, in the place of the Honourable Chief Justice Wood, deceased. This appointment has been received with satisfaction by the profession. The learned gentleman has long been prominent at the Bar of this Province, and in earlier days was a conspicuous man in politics.

The resignation of Mr. Justice Miller, of the same Province, is another of those defections from the Bench which we have spoken strongly of before. It is true that the Bench in this country are poorly paid and hardly worked; but the profession know this, and knowing it accept their commissions. They know that they must expect nothing but devotion to their Sovereign in the work allotted to them; and the conduct of a man cannot be too severely condemned, who effects a temporary alliance with the Bench only to cast it off at a whim or caprice. The one consolation is that such a resignation is always a gain to the country.

In the appointment of Thomas Wardlaw Taylor, Esq., Q.C., late Master of the Supreme Court of Judicature, Ontario, to the vacancy caused by Mr. Miller's resignation, Manitoba acquires an excellent Judge. The best measure of the gain to the Manitoba Bench is the loss to Ontario of a most efficient officer, which will be most severely felt.

We can say this without disparagement to Mr. Taylor's successor, Thomas Hodgins, Esq., Q.C.

In New Brunswick the Honourable J. J. Fraser, Q.C., succeeds Mr. Justice Duff, deceased.

BOOK REVIEWS.

The Principles of Equity, intended for the use of students and the profession. By EDMUND H. T. SNELL, of the Middle Temple, Barrister at-Law. Sixth edition. To which is added an Epitome of the Equity Practice. Third edition. By ARCHIBALD BROWN, M.A., Edin. and Oxon., and B.C.L., Oxon., of the Middle Temple, Barrister-at-Law. London: Stevens & Haynes, 1882.

The changes wrought by the Judicature Acts necessitate a new treatment of the principles of equity, and the only wonder is that such an edition of this work as the present did not sooner make its appearance. Notwithstanding the fusion of the Courts and the abolition of the auxiliary jurisdiction, as such, of Courts of Equity, the learned editor retains the ancient method of treatment of his subject by the subdivision of the jurisdiction of equity. "It is to be observed," he says, "that the distinction between matters which were and are within the originally exclusive jurisdiction and the originally concurrent jurisdiction of equity is still of vital importance—it being *equitable* rights and remedies, properly so called, that are enforced and applied in the originally exclusive jurisdiction, while it is *legal* rights and remedies that are enforced and applied in the originally concurrent jurisdiction." For our own part we think the perpetuation of the old treatment is not desirable in a students' book. Equity now is the law, whenever there is a conflict between the rules of equity as formerly existing and the rules of law as formerly existing; and the student should set out with the idea that there is one law administered by our Courts, of which equity is now the principal ingredient. It is true that there is nothing misleading in the plan of the book; for, though the jurisdiction as equity jurisdiction is gone, the doctrines of equity, the growth of

that jurisdiction, not only still survive, but are incorporated with the law as administered by all the Courts. Would it not, then, have been a prudent thing to have discarded a nomenclature which does not present these doctrines to the student as substantive law ?

Of the merits of the book, nothing that we can say can add to its reputation. The provisions of the recent English legislation are all incorporated in the text, and the most recent decisions are noted. The compendium of Equity Practice will be found most useful.

BOOKS RECEIVED.

A Treatise on the Law of Dower. By MALCOLM GRÆME CAMERON, of Osgoode Hall, Barrister-at-Law. Toronto: Carswell & Co. 1882.

Law and Lawyers in Literature. By IRVING BROWNE, author of "Humorous Phases of the Law," and "Short Studies of Great Lawyers." Boston: Soule & Bugbee. 1883.

REVIEW OF EXCHANGES.

Albany Law Journal.—21st October, 1882.

Cnec in Jeopardy—Subsequent Indictment Founded on same Transaction. Cites a number of American cases.

Swearing by Telephones, by LEX. The learned writer thinks that affidavits may be sworn with a commissioner or notary at one end of the wire and a deponent at the other. If the deponent were in one State and the notary in another, in which State would the affidavit be sworn? If this point can be satisfactorily settled, perhaps foreign commissions will be supplanted by telephone swearing.

Ibid.—9th December, 1882.

Implied Covenant of fitness on Lease of Real Estate. Some English and American cases are cited.

Validity of Divorces upon Constructive process of other States against residents of New York, II., by Lucien B. Chase. The subject is continued from the number of 2nd December, 1882.

Ibid.—16th December, 1882.

Rules relating to Opinion Evidence, by JOHN D. LAWSON. As to physicians, surgeons and disease, the learned writer gives the following rules. Rule 1. The opinion of a medical man upon (a) the condition of the human system, (b) the cause of death, or the cause or effect of an injury, (c) the effect of a particular treatment, (d) the likelihood of recovery (e) the mental condition of a person, and the like, is admissible. Rule 2. A medical man cannot testify as an expert as to (a) matters not of skill in his profession, or (b) or conclusions or inferences which it is the duty of the jury to draw for themselves. Rule 3. A medical man is an expert on (a) the value of medical services, but not (b) as to the measure of damages. Illustrations of each rule are given.

Ibid.—23rd December, 1882.

Common Words and Phrases. The following words and phrases have been judicially defined:—Package; Packing a jury; Paintings; Paintings on porcelain—decorated china; Peddler; Pleasure waggon, stage; Post office; Presence.

Merger or extinguishment in the Law of Mortgage of Real Estate, by CHARLES MIEHLING. English and American cases are cited.

Ibid.—6th January, 1883.

Unconscionable Contracts. Some recent English and some American cases upon catching bargains are cited.

Ibid.—13th January, 1883..

Evasion of Contract not to carry on Business. Several cases, English and American, are cited.

American Law Register—November, 1882.

Disfranchisement from Private Corporations, by LAWRENCE LEWIS, JR. "Disfranchisement, in the broad sense of the term, may be defined as the Act of depriving a member of a corporation of his right as such by expulsion. The power of disfranchisement, though vested in many corporations, cannot be exercised by them in an arbitrary manner." The subject is treated under three heads: 1. For what cause may a member be disfranchised? 2. In what manner must a member be disfranchised? 3. In case of an illegal disfranchisement, what remedy will the Courts afford? Corporations whose purposes are primarily or exclusively those of gain, have no power of disfranchisement, unless it is expressly conferred by the charter. Instances of sufficient causes for disfranchisement are given under the following heads: Commercial Associations, Board of Fire Underwriters, Medical Societies, Social Clubs, Educational and Charitable Institutions, Religious Societies. Numerous cases are cited.

Ibid.—December, 1882.

Receivers for Co-tenants, by JAMES P. OLIVER. "The power to appoint receivers of the common property at the instance of one of the co-tenants has been characterized as an extraordinary one, which the Court should not exercise except in the clearest cases." A receiver will not be granted against a tenant in common unless in cases of destructive waste or gross exclusion. Where the interest which the parties have in the land is held for the purposes of trade, and their relation to each other resembles that of partners, a receiver may be appointed, though the facts would not justify that action if the parties were ordinary tenants in common. Instances of what amounts to exclusion are given.

American Law Review.—November, 1882.

Charter Parties, by ORLANDO F. BUMP, is continued.

Discriminative Traffic Rates, by ADELBERT HAMILTON. There may be (1) unjust discrimination as to the facilities and accommodation for transportation, and (2) unjust discrimination as to the prices charged for transportation services. The examination of the subject is held with reference to Quantity of transportation service; Quality of transportation service; Persons for whom the transportation service is performed; Competition, and its legal effect upon traffic rates.

Ibid.—December, 1882.

Some Disputed Questions in the Law of Commercial Paper, by HENRY WADE ROGERS. The following points are discussed. Stipulation for Attorney's fee in a promissory note; Rate of interest after maturity of note; Liability of third person endorsing before delivery.

The English Judicature System, by M. D. CHALMERS. An excellent account of the machinery of justice in England as at present established.

Canada Law Journal.—1st November, 1882.

Subrogation of Insurance Companies to the Rights of Mortgagees, by A. H. F. L. The recent cases of *Howes v. Dominion Fire Insurance Co.*, 2 C. L. T. 355, and *Klein v. Union Fire Insurance Co.*, 2 C. L. T. 512, are discussed.

Ibid.—15th December, 1882.

Delegation of Legislative Power, by T. H. The case of *Regina v. Hodge*, 46 U. C. R. 141; in appeal, 7 App. R. 246, forms the text. An enumeration of Acts in which the power is granted to subordinate bodies to make by-laws, rules and regulations, ordinances, etc., having the same effect as laws made by the Legislature. The fact that subordinate or derivative legislatures have done this does not prove their power to abandon their power in favour of other bodies appointed by themselves. The culminating absurdity of holding that both the Parliament of Canada and the Provincial Legislatures, having sovereign powers within their spheres, can therefore appoint other bodies to exercise these powers, is reached when the one professes to empower the other to make the very laws which it is forbidden to make by the creator of both of them, the Imperial Parliament. There is no reason why the doctrine should not be carried to that length; for if the Legislature, on account of its sovereignty within its own sphere, can establish a subordinate law-making body, there is nothing in the doctrine to limit its powers of choosing its creature. We are therefore bold enough to think that *Regina v. Hodge* in appeal, and perhaps *Regina v. O'Rourke*, 3 C. L. T. 27, on that point require re-consideration.

Ibid.—1st January, 1883.

Who should pay the Doctor? Some cases are cited illustrative of the liability of a person to answer for the debt of another to the doctor, of the husband's liability to pay a doctor for professional attendance upon his wife, of the father to pay for necessary medicines for his infant son, of the infant's liability for them as necessities, and other cases.

Interest payable by Contract. *Popple v. Sylvester*, 47 L. T. N. S. 329, is discussed.

Central Law Journal.—15th September, 1882.

Recent Phases of Defamation, by A. J. DONNER. Some cases of slanderous words actionable *per se* are given. Recent decisions upon other branches of the subject are also discussed.

Tort of the Person in Criminal Cases, by WILBER L. STONEX.

Ibid.—22nd September, 1882.

Partnership—Firm Name on Accommodation Paper, by WM. L. MURFREE, JR. As a general rule an accommodation endorsement, or acceptance, in the name of the firm will not be binding upon the partner not assenting to it, unless the paper shall have fallen into the hands of an innocent holder for value. Who is an innocent holder then forms the subject of inquiry.

Ibid.—29th September, 1882.

Mental Suffering as an Element of Damages, by WILLIAM L. MURFREE, SR. "The questions we propose to consider are, When, and under what conditions, damages, either compensatory or exemplary, are awarded for such injuries as result in the mental anguish and suffering of the plaintiff, or of the party injured; how far such suffering may be considered an element in estimating such damages; in what cases the person injured may recover, and when the party standing *in loco parentis*; how far damages are recoverable when the injury is also punishable as a criminal offence; when they may be considered vindictive, and when merely compensatory; how far they are modified by the fact that the injury complained of is wilful, or the result of negligence; what is the general duty of the jury in such cases, and how far its discretion will be controlled by the Court." The learned writer concludes "that damages for mental suffering will, in all proper cases, be awarded where the plaintiff is the party directly injured by the tort of any character, the violence, or the gross negligence of the defendant. When the party injured is incompetent * * one who stands to her *in loco parentis*, * * is entitled to damages for * * mental suffering. * * Where an injury results in death * * no damages for mental suffering can be awarded in favour of any survivor."

Ibid.—6th October, 1882.

Fear: its Legal Limitations, by FRANCIS WHARTON. The question is discussed as to what degree of threatening is sufficient to establish the defence of duress. That due allowance must be made for the age, sex, and temperament of the person threatened seems to be the better and more reasonable opinion.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

In the Supreme Court of Canada.

ONTARIO.]

McLAREN v. CALDWELL.

R. S. O. cap. 115, sec. 1, construction of—Non-floatable streams—Private property.

By the decree of the Court of Chancery for Ontario the respondents were restrained from driving logs through, or otherwise interfering with, a certain stream, where it passed through the lands of the plaintiff, and which portion of said stream was artificially improved by the plaintiff, so as to float saw logs, but was found by the learned Judge at the trial not to have been navigable or floatable for saw logs or other timber, rafts, and crafts when in a state of nature, and the Court of Appeal reversed this decree (1 C. L. T. 456) on the ground that C. S. U. C. cap. 48, sec. 15, re-enacted, by R. S. O. cap. 115, sec. 1, made all streams, whether naturally or artificially floatable, public waterways.

Held, reversing the judgment of the Court below, and restoring the decree, that the learned Vice-Chancellor who tried the case, having determined that upon the evidence adduced before him, the stream at the *locus in quo*, when in a state of nature, was not floatable without the aid of artificial improvements, and such finding being supported by the evidence in the case, the appellant had at common law the exclusive right to use his property as he pleased, and to prevent respondents from using as a highway the streams in question where they flowed through appellant's private property.

Held, also (approving of *Boale v. Dickson*, 13 C. P. 337), that the Statute C. S. U. C. cap. 48, sec. 15, re-enacted by R. S. O. cap. 115, sec. 1, which enacts that it shall be lawful for all persons to float saw logs and other

timber, rafts, and crafts down all streams in Upper Canada, during the spring, summer and autumn freshets, etc, extends only to such streams as would, in their natural state, without improvements, during freshets, permit saw logs, timber, etc. to be floated down them, and that the portions of the stream in question, where it passes through the appellant's land, were not within the said statute.

H. Cameron, Q.C., McCarthy, Q.C. and Creelman, for the appellant.

James Bethune, Q.C. and L. R. Church, Q.C., for the respondents.

GRAND JUNCTION RAILWAY CO. v. COUNTY OF PETERBOROUGH.

*Municipal by-law—Validity of—Remedy—Action at law—Mandamus—
—34 Vict. cap. 48 (O)—Construction of.*

Appeal from the judgment of the Court of Appeal, 1 C. L. T. 453.

Held, on the facts there stated, affirming the decision of the Court below, that the effect of the Statute 34 Vict. cap. 48 (O), apart from any effect it might have of recognizing the existence of the Railway Co., was not to legalize the by-law in favour of the company, but was merely to make the by-law as valid as if it had been read a third time, and as if the municipality had had power to give a bonus to the company, and, therefore, the appellants could not recover the bonus from the defendant.

Per Gwynne, J. (Fournier and Taschereau, JJ., concurring). As the undertaking entered into by the municipal corporation contained in by-law for granting bonuses to railway companies, is in the nature of a contract entered into with the company for the delivery to it of debentures upon conditions stated in the by-law, the only way in Ontario in which delivery to trustees on behalf of the company can be enforced, before the company shall have acquired a right to the actual receipt and benefit of them by fulfilment of the conditions prescribed in the by-law, is by an action under the provisions of the Statutes in force there regulating the proceedings in actions, and not by summary process by motion for the old prerogative writ of *mandamus*, which the writ of *mandamus* obtainable upon motion without action, still is.

C. Robinson, Q.C., and H. Cameron, Q.C., for the appellants.

Bethune, Q.C., and Edwards for the respondents.

QUEBEC.]

RUSSELL v. LEFRANCOIS.

Will, validity of—Insanity—Legacy to wife—Error—False cause—Question of fact on Appeal—Duty of Appellate Court.

This was an appeal from the Court of Queen's Bench for Quebec. The action was originally brought in the Superior Court by Pierre Lefrancois' executor under the will of the late Wm. Russell of Quebec, against

William C. Austin, curator to the estate of Russell during the lunacy of the latter, to compel Austin to hand over the estate to the executor.

After preliminary proceedings had been taken, Elizabeth Russell, the present appellant, moved to intervene and have Russell's last will set aside, on the ground that it had been executed under pressure by Dame Julie Morni, Russell's wife, in whose favour the will was made, while the testator was of unsound mind. The intervening party claimed and proved that Morni was not the legal wife of Russell, having another husband living at the time the second marriage was contracted. Russell, who was a master pilot, died in 1881, having made a will two years previously. His estate was valued at about \$16,000. The evidence in the case was very voluminous and contradictory. On 4th October, 1878, Russell made a will by which he bequeathed \$4,000 and all his household furniture and effects to his wife, Julie Morni; \$2,000 to his niece, Ellen Russell; \$1,000 to the Rev. Father Sexton, for charitable purposes, and the remainder of his estate to his brothers, nephews and nieces in equal shares. On the 8th of the same month he made another will before the same notary, leaving \$800 to his wife, Julie Morni, \$400 to each of his nieces, Mary and Elizabeth Russell, and \$400 to his brother Patrick, with reversion to the nieces if not claimed within a year, and the remainder to Ellen Russell. On the 27th November, 1878, Russell made a will, which is the subject of the present litigation, and by which he revoked his former wills, and gave \$2,000 to Father Sexton, for the poor of the parish of St. Rochs, and the remainder of his property to his wife Julie Morni.

On the 10th January following, Russell was interdicted as a maniac, and a curator appointed to his estate. He remained in an asylum until December, 1879, when he was released and lived until his death with his sister, Ellen Russell, sister of the appellant. Mr. Justice Tessier, of the Superior Court, upheld the validity of the will, and his decision was confirmed by the Court of Queen's Bench.

Held, (i) reversing the judgment of the Court of Queen's Bench, Ritchie, C.J., and Strong, J., dissenting, that the proper inference to be drawn from all the evidence as to the mental capacity of the testator to make the will of the 27th November, was that the testator at the date of the making of said will, was of unsound mind. (ii) That, as it appeared that the only consideration for the testator's liberality to Julie Morni was that he supposed her to be "my beloved wife Julie Morni," whilst at that time J. M. was, in fact, the lawful wife of another man, the universal bequest to J. M. was void, through error and false cause. (iii) That it is the duty of an Appellate Court to review the conclusion arrived at by Courts whose judgments are appealed from upon a question of fact when such judgments do not turn upon the credibility of any of the witnesses, but upon the proper inference to be drawn from all the evidence in the case.

Irvine, Q.C., for the appellant.

Andrews and Fitzpatrick, for the respondents.

In re MEGANTIC ELECTION CASE.

FRECHETTE v. GOULET.

Dominion election case—Preliminary objection—Onus probandi.

In this case a petition was presented by the respondents complaining of an undue election and return for the County of Megantic at the last election for the House of Commons. The petition was met by preliminary objection, in which the sitting member alleged, *inter alia*, that the petitioners were not electors, nor qualified to vote at the election in question, etc. A day was fixed for the hearing of the preliminary objections at Arthabaska, when Mr. Justice Plamondon held that the *onus probandi* was on the present appellant to support his preliminary objections, and, no evidence being offered by either party, he dismissed them with costs.

Held, (per Fournier, Henry and Gwynne, JJ.) following the practice adopted by the Superior Court of Quebec, sitting as an Election Court in case of *Duval v. Casgrain*, that the *onus probandi* was on the party making the preliminary objections.

Ritchie, C.J., and Strong and Taschereau, JJ. were of a contrary opinion. The Court being equally divided the appeal was dismissed without costs.

Crepeau and Gormully, for the appellant.

Irvine, Q.C., for the respondent.

GRANT v. BEAUDRY.

Action for false arrest against magistrate—Notice—C. S. L. C. cap. 101, sec. 1.

David Grant, who was the plaintiff in the first instance, was Grand Master of the Orange Order for Montreal. As such he was arrested for disturbing the peace by a public procession, and brought an action against the Mayor of Montreal for false arrest. The notice given by appellant's attorney was as follows:—

To the Hon. J. L. Beaudry, Mayor of Montreal,

SIR,—We give you notice that David Grant of the City of Montreal, salesman and trader, will claim from you personally the sum of ten thousand dollars damages, by him suffered from the abuse made of your authority in causing his arrest illegally and for no cause on the twelfth day of July last (1878), and that unless you make proper amend and reparation of such damages within a month, judicial proceedings will be adopted against you.

Yours, etc.,

DOUTRE, BRANCHAUD & McCORD.

Advocates for Plaintiff.

Montreal, 19th October, 1878:

The Superior Court dismissed the action for want of proper notice. This judgment was affirmed on appeal to the Court of Queen's Bench.

but the Court went further, and stated that Grant was properly arrested, being a member of an illegal association.

Held, that the notice was insufficient, and that an expression of opinion as to the legality or illegality of the Orange Association was extra-judicial and unwarranted.

Doutre, Q.C., for the appellant.

Roy, Q.C., for the respondent.

NOVA SCOTIA.]

CALDWELL v. STADACONA FIRE INSURANCE CO.

Fire Insurance—Policy—Proofs of loss—Waiver—Estoppel—Insurable Interest.

Held, reversing the judgment of the Court below, that where the agent of the defendants had requested the appellant to delay putting in proofs of loss, the Company was estopped from setting up the defence that the waiver of the condition respecting the putting in of proofs should have been in writing according to another condition.

While the policy was in force the buildings were conveyed to B., who, the next day, conveyed to the wife of the assured.

Held, that the insured had such an insurable interest by reason of being seised of an estate in fee simple in right of his wife as to entitle him to recover.

Gormully, for the appellant.

Casgrain, for the respondent.

NEW BRUNSWICK.]

REGINA v. THEAL.

Crown case reserved—Indictment—Misjoinder of Counts—Evidence.

An indictment contained two counts, one charging the prisoner with murdering M. J. T., on the 10th November, 1881; the other, with manslaughter of the said M. J. T., on the same day. The Grand Jury found a true bill. A motion to quash the indictment for misjoinder was refused, counsel for the prosecution electing to proceed on the first count only.

Held, affirming the judgment of the Supreme Court of New Brunswick, that the indictment was sufficient.

The prisoner was convicted of manslaughter in killing his wife, who died on the 10th November, 1881. The immediate cause of her death was acute inflammation of the liver, which the medical testimony proved might be occasioned by a blow or a fall against a hard substance. About three weeks before her death, the prisoner had knocked his wife down with a bottle; she fell against the door and remained on the floor insensible for some time; she was confined to her bed soon afterwards and never re-

covered. Evidence was given of frequent acts of violence committed by the prisoner upon his wife within a year of her death, by knocking her down and kicking her in the side.

Held, affirming the judgment of the Court *a quo*, that there was evidence to leave to the jury that the disease which caused her death was produced by the injuries inflicted by the prisoner, and that the evidence of violence committed within a year was properly received.

Lash, Q.C., for the prisoner.

McLeod, Q.C., for the Crown. •

CHAPMAN v. TUFTS *et al.*

Unstamped bill of exchange—42 Vict. cap. 17, sec. 13—Knowledge—Question for Judge.

Appeal from the decision of the Supreme Court of New Brunswick, refusing a motion to set aside the verdict and enter a non-suit. The action was brought by the respondents against the appellant to recover the amount of a bill of exchange. It appeared that the draft when made, and when received by respondents, had no stamps ; that they knew then that bills and promissory notes required to be stamped, but never gave it a thought ; and their first knowledge that the bill was not stamped was when they gave it to their attorney for collection on the 26th February, 1880, and that they immediately put on double duty stamps.

The bill was received in evidence, leave being reserved to the defendant to move for a non-suit ; the learned judge stating his opinion that though as a fact, the plaintiff knew the bill was not stamped when they received it, and knew that stamps were necessary, they accidentally and not intentionally omitted to affix them till their attention was called to the omission in February, 1880.

Held. (i) that the question as to whether the holder of a bill or draft has affixed double stamps upon an unstamped bill or draft so soon as the state of the bill was brought to his knowledge within the terms of 42 Vict. cap 12, sec. 13, is a question for the Judge at the trial and not for the jury.

(ii) That the " knowledge " referred to in the Act is actual knowledge and not imputed or presumed knowledge, and that the evidence in this case showed that the plaintiff acquired this knowledge for the first time on the day he affixed stamps for the amount of the double duty, 26th February, 1880.

Davies, Q.C., for the appellant.

Travis, for the respondents.

MANITOBA.]

FARMER v. LIVINGSTONE.

Dominion Lands Act, 35 Vict. cap. 23, sec. 33, sub-sects. 7 and 8—Homestead—Patent, validity of—Bill—Equitable or statutory title—Demurrer.

The plaintiff, in his bill of complaint, alleged in the 6th paragraph as follows: "Prior to the 1st of May, 1875, the plaintiff made application to homestead the said lands in question herein and procured proper affidavits according to the Statute whereby he proved to the satisfaction of the Dominion lands agent in that behalf (and the plaintiff charges the same to be true), that the said defendant Farmer had never settled on or improved the said lands assumed to be homesteaded by him or the lands herein in question, but had been absent therefrom continuously since his pretended homesteading and pre-emption entries, and thereupon the claim of the defendant Farmer under the said entries became and were forthwith forfeited, and any pretended rights of the defendant Farmer thereunder ceased, and the plaintiff thereunder on or about the 8th May, 1875, and then and there with the assent and by the direction of the Dominion lands agent, who caused the same to be prepared for the plaintiff, signed an application for a homestead right to the lands in question in this suit according to Form "A" mentioned in 35 Vict. cap. 23, sect. 33, and did make and swear to an affidavit according to form "B" mentioned in sect. 33, sub-sect. 7 of the same Act, and did pay to the same agent the homestead fee of \$10, who accepted and received the same as the homestead fee, and thereupon the plaintiff was informed that he had done all that was necessary or required for him to do under the Statute and the regulations of the Department, and that the Statute said, 'Upon making this affidavit and filing it and on payment of an office fee of \$10 (for which he shall receive a receipt from the agent) he should be permitted to enter the lands specified in the application,' and thereupon and in pursuance thereof and in good faith the plaintiff did forthwith enter upon said lands and take *actual* possession thereof, and has ever since remained in actual occupation and occupation thereof, and has erected a house and other buildings thereon, cleared a large portion of said lands and fenced and cultivated the same, and made many other valuable improvements thereon, costing in the aggregate \$1,000."

Demurrer for want of equity.

Held, reversing the judgment of the Court below, and allowing the demurrer that the plaintiff had no *locus standi* to attack the validity of the patent issued by the Crown to the defendant, as he had not alleged a sufficient interest or right to the lands therein mentioned, within the meaning of sub-sections 7 and 8 of sec. 23 of the Dominion Lands Act, there being no allegation that an entry of a homestead right in the lands in question had been made, and that plaintiff had been authorized to take possession of the land by the agent, or by some one having authority to do so on behalf of the Crown.

J. Bethune, Q.C., for the appellant.

McCarthy Q.C., for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

In re HALL.

*Extradition—Appeal from High Court—Court of Appeal equally divided—
Effect of—Res judicata—Habeas Corpus—Appeal.*

The prisoner was remanded for extradition by the Chancery Division of the High Court of Justice ; 2 C.L.T. 592. On appeal, this Court was equally divided. A second writ of *Habeas Corpus* was then obtained, and the prisoner was brought before the Common Pleas Division, when he was remanded ; 3 C.L.T. 29.

An appeal from the decision of the Common Pleas Division was now dismissed.

Per Hagarty, C.J., (Spragge, C.J.O. concurring). The appeal cannot be entertained. The prisoner having already appealed to this Court from the judgment of the Chancery Division, he must finally abide by the legal result of such appeal, viz., the dismissal of it and consequent affirmance of the decision appealed from, and cannot ask the interference of this Court on the same state of facts.

Per Burton and Patterson, J.J.A. The grounds for the technical rule of practice of the House of Lords on an equal division have no existence in other appellate tribunals, even when, as in this case, the appellate Court is the Court of last resort. The effect of an equal division in this Court, as in a Court of first instance, is simply that the rule or motion drops or the appeal is dismissed, and the judgment below remains undisturbed, but is not considered as a binding authority.

The Act 29-30 Vict. cap. 45, apparently substituted the right of appeal in *Habeas Corpus* cases for successive applications from Court to Court.

Per Patterson, J.A. By the effect of the Judicature Act, there is no distinction between the Divisions of the High Court, but a decision of any one Division is a decision of the High Court. This matter has therefore been already disposed of on the former appeal.

Bethune, Q.C. and Murphy, for the prisoner.

Fenton, contra.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[CAMERON, J., 26TH DECEMBER, 1882.]

In re WHITE & THE TOWNSHIP OF SANDWICH EAST.

Drainage by-law—Assessment of land benefitted not within petition—Objections to by-law—Discretion of Court.

A petition for a drainage by-law was signed by a majority of the owners of the land designated in the petition, but the applicant was not one of the petitioners, nor was his land part of that described in the petition, nor did he reside on any part of that land, but the surveyor who made the examination and prepared the estimates, reported that his land would be benefitted by the works, and he was accordingly assessed, and the by-law was finally passed.

Held, that the by-law was valid.

Held, also, that the question whether the lands are in fact benefitted is one for the Court of Revision or the Judge of the County Court on appeal therefrom.

No copies of the by-law or notices attached were posted up as required, but the applicant evidently knew of the by-law before it was passed.

Held, that this application was to the discretion of the Court, and the objection was not one to be given effect to.

Caswell, for the motion.

Aylesworth, contra.

[OSLER, J., 9TH JANUARY, 1883.]

REGINA v. CHAPMAN.

Auctioneer—Municipal Act—License—Selling land by auction—Conviction—Quashing conviction—Magistrate licensed auctioneer—Interest—Disqualification—Costs.

By a by-law of the County of Huron passed pursuant to the Municipal Act, sec. 465, s-s. 2, it was provided that it should not be lawful for any person to expose or offer at public auction any wares, goods or merchandise of any kind before having first obtained from the treasurer of the county a license, authorizing him to sell. The defendant was convicted of a breach of this by-law, for that, without having such a license, he sold a piece of land by auction.

Held, that the conviction was clearly bad, for the by-law did not refer to lands; nor is a by-law prohibiting the selling of land by auction without a license authorized by the Municipal Act, which relates only to "goods, wares, merchandise or effects."

Two of the four convicting Justices were licensed auctioneers for the county and persisted in sitting after objection taken on account of interest, though the case might have been disposed of by one Justice.

Held, that they were disqualified, and in quashing the conviction on that ground also, the Court ordered them to pay the costs.

Aylesworth, for the defendant.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 29TH DECEMBER, 1882.]

KELSEY v. ROGERS.

Contract to make Staves—Property in—Chattel Mortgage Act.

The plaintiff residing in Detroit, on 22nd December, 1880, entered into an agreement with M., whereby M. agreed to furnish to the joint account of the parties, loaded in cars at stations on the G. T. and G. W. Railways, 12,000 to 15,000 staves, describing the kinds with the prices, to be loaded in cars and ready for shipment not later than 1st June, 1881, to be a joint account transaction, share and share alike in gain or loss; the staves to be consigned to a Quebec firm which would pay freight and commission. The plaintiff to furnish a competent man to cull the staves, and to make reasonable advances from time to time as the progress of the work should warrant, the expenses of the culler, and interest on advances, to be charged to the joint account; the staves to be considered, whether marked or not, the property of the plaintiff as security for advances.

Held, that under this agreement the staves were the property of the plaintiff as soon as ready, and not the property of M., and that the agreement did not require filing under the Chattel Mortgage Act.

Meredith, for the plaintiff.

Gibbons, for the defendant.

CHANCERY DIVISION.

[PROUDFOOT, J., JANUARY, 1883.]

HENDRIE v. THE GRAND TRUNK RAILWAY CO.

THE GRAND TRUNK RAILWAY CO. v. THE TORONTO, GREY
& BRUCE RAILWAY CO.

Railway—Bondholders—Registration of bonds—Right of bondholders to vote.

By 31 Vict. cap. 40, sec. 21 (O.), the T. G. & B. Railway Co. were authorized to issue bonds, provided that if the interest were at any time in arrear at the next ensuing general annual meeting the bondholders

should have the same rights, privileges and qualifications for directors and for voting as shareholders. By 38 Vict. cap. 56, sec. 13 (O.), this right was extended so as to be exercisable at special meetings. By 44 Vict. cap. 74, sec. 14 (O.), the company was authorized to make agreements with other companies, provided that assent be given thereto by at least two-thirds of the shareholders present, or represented by proxy at any meeting specially called for the purpose.

Held, that under these enactments bondholders had equally the right with shareholders to vote upon an agreement made with another company.

BEEMER v. OLIVER.

Insolvent Act of 1875—Sale by assignee—Creditor receiving dividend—Objecting to sale.

J. L. F. conveyed land to O., on 2nd January, 1878; O. conveyed to F. L. F., wife of J. L. F., on 9th March, 1878; both conveyances were registered on 20th April, 1878. On 13th June, 1878, J. L. F. became an insolvent. In July, 1878, the plaintiff, a judgment creditor of F. L. F., placed writs against her lands in the sheriff's hands. On 20th November, 1878, J. L. F.'s assignee in insolvency obtained a decree setting aside the conveyances from J. L. F. to O., and from O. to F. L. F. The plaintiff was not a party to that suit. The assignee on 13th March, 1879, sold and conveyed the land to the defendant, and the deed was registered 18th March, 1879. On 28th August, 1880, the sheriff having sold the lands under the plaintiff's writ made a deed to the plaintiff who bought them in, which was registered 18th September, 1880. The plaintiff proved on J. L. F.'s estate. He attended at the assignee's sale of the land and forbade it, but afterwards received a dividend of which the proceeds of the sale of the land formed part.

Held, that the plaintiff by his acceptance of the dividend was estopped from taking proceedings to set aside the sale to the defendant. *Miller v. Hamelin*, 2 C. L. T. 493, explained and distinguished.

DIXON v. CROSS.

Devise of land to be divided—Division—Land locked parcel—Way of necessity—Locality of—Conveyance of.

A testator devised 100 acres of land, bounded on the west by a highway and on the three other sides by the lands of strangers, to his two sons, to each of them 50 acres. The sons divided the land by a line drawn north and south.

Held, that the effect of the will and the division was the same as if the two parcels had been devised separately, and that the owner of the east half had a way of necessity over the west half to the highway.

Held, also, that the right to a way of necessity is confined to a definite way to be determined by the agreement of the parties, or by the owner of the servient tenement, or by the owner of the dominant tenement on default of the other.

Held, also, that a change in the locality of a way of necessity by agreement of the parties would not destroy the right; nor would the grant of a specific line for the road, in case a purchaser should buy without notice of such grant.

The plaintiff's predecessor in title had obtained a conveyance from the owner of the west half, the predecessor in title of the defendant, of a strip of land along the northerly end of his land for a way to the highway, but the conveyance was not registered till after the defendant purchased. This strip was, however, used as a way for over thirty years until the interruption complained of in this action, of which the defendant had notice.

Held, that he took the west part subject to the way.

The conveyance from the devisee of the east half comprised all ways, easements, privileges, and appurtenances to the land belonging or therewith used and enjoyed. The subsequent deeds were in the statutory short form.

Held, that, whether it was considered as a way of necessity or a way used and enjoyed with the land, the plaintiff was entitled thereto.

[FERGUSON, J., 8TH JANUARY, 1883.]

GAGE v. CANADA PUBLISHING COMPANY.

Trade mark—Family name—Sale of article bearing name—Future use of name in same manner—Fraud—Injunction.

The plaintiff and defendant Peatty carried on partnership together from 1st May, 1877, to 28th August, 1879, during which time Beatty prepared a series of headline copy books, styled "Beatty's Copy Books" and "Beatty's Copies," which were extensively sold and realized large profits. The design of the cover was registered as a trade mark. In 1879 Beatty retired from the firm, his interest having been purchased by the plaintiff, the chief assets being the series of copy books. Beatty afterwards at the solicitation of his co-defendants, the Publishing Co., and in consideration of a royalty to be paid to him and with the express purpose of enabling the Publishing Co. to publish a copy book to be called "Beatty's" prepared another series of copy books differing (in the opinion of the Court) only in a colourable degree from the plaintiff's series. The title of the new series was "Beatty's new and improved head line copy book," and they were in such a form and under such a cover as to lead the public to believe that they were the books published by the plaintiff. The plaintiff's business was injured by the sale of the new series.

Held, that the plaintiff had not acquired the right to use the name "Beatty" as a trade mark. But.

Held, also, that the conduct of the defendants in publishing the new series of books was fraudulent and collusive, inasmuch as they intended by simulating the plaintiff's books to deprive him of the profits he would otherwise have made, and that he was entitled to a perpetual injunction restraining defendants from advertising, publishing or selling, or offering for sale the books called "Beatty's new and improved head line copy books" in and with its present cover, or in any other form of cover calculated to deceive persons into the belief that it was the plaintiff's book,

[15th JANUARY, 1883.]

HARPER v. CULBERT.

Mortgage—Sale under power—Voluntary conveyance of equity of redemption—Payment of surplus to grantee—Purchase of judgment debt—Action by assignee.

J.'s land being subject to a mortgage, he conveyed the equity of redemption to I., who re-conveyed to J.'s wife. An action by a judgment creditor to set aside the conveyances was compromised by J.'s wife giving the creditor an order upon the mortgagee for the amount of the debt, which he paid out of the proceeds of a sale under the power in his mortgage. After the conveyances above mentioned the plaintiff's assignors obtained judgment against J., and placed writs in sheriff's hands. The mortgagee then gave notice of sale under his power to the plaintiff, amongst others, and sold the lands. No claim was made by the plaintiff till after the surplus was exhausted. The surplus above the mortgage debt was exhausted in paying an execution creditor and the order given by J.'s wife.

Held, that the conveyances to I. and from I. to J.'s wife which were without consideration and in fraud of creditors, were voidable only and valid until set aside; that the mortgagee was justified in so treating them, and in paying over part of the surplus proceeds of the sale upon the order of J.'s wife, the apparent owner of the equity of redemption.

The judgment upon which the plaintiff maintained this action was obtained by L. & C. for the sum of \$270, and assigned to the plaintiff for \$60.

Held, that the plaintiff was not guilty of champerty and maintenance because he exercised his remedy of contesting what he claimed to be a fraud upon the judgment, but that he had all the rights of the judgment creditors.

J. E. McDougall and W. Seton Gordon, for the plaintiff.

S. H. Blake, Q.C., and W. Cassels, and Hudspeth, Q.C., for several defendants.

SIMPSON v. CORBETT.

Executor—Guardian and ward—Death of ward without heirs—Redemption of ward's mortgaged estate—Revival of trust—Escheat—Patent from Lieutenant-Governor—Account.

C., the defendant, was appointed executor of M.'s will, whereby his real and personal estate were devised to M.'s two illegitimate children, and the survivor of them, to whom C. was also appointed guardian. Both children died under age, intestate and without issue. The realty was subject to a mortgage. After the death of the children C. paid the mortgage off and took an assignment to himself. The Lieutenant-Governor, assuming to act under R.S.O. cap. 94, and claiming the lands by escheat, by Letters Patent assumed to grant the lands and personalty to the plaintiff. The plaintiff took out letters of administration to the child of M. last deceased, which recited the facts and the patent, and claimed an account from the defendant. The defendant claimed that the mortgagee took absolutely upon the decease of M.'s surviving child, that there was no escheat, that if there was, the Lieutenant-Governor was not the representative of the Crown, that the Letters Patent were void, and the letters of administration founded on them were also void.

Held, that as C. had been a trustee as executor of M., and guardian of M's children, the trust became again impressed upon the lands in his hands after the assignment from the mortgage.

Held, also, that the defendant could not in this action dispute the validity of the Letters Patent, but that the plaintiff under his letters of administration showed a good title as against him until the letters should be revoked or set aside; and that the defendant was therefore liable to account.

MacLennan, Q.C., for the plaintiff.

Bethune, Q.C., for the defendant.

GREEN v. WATSON.

Patent of invention—Sale of right to manufacture—Covenant to warrant and defend manufacture—Construction of—Infringement of patent—Breach of covenant—Effect on right to receive royalty.

B., the patentee of a machine, granted the plaintiffs the exclusive right to manufacture it in Canada, and the plaintiff, in consideration of a royalty, assigned to defendants the exclusive right to manufacture and sell it within a certain territory. The plaintiffs covenanted that B. would "warrant and defend" the defendants in the possession of the rights, and that if B. neglected to "protect and defend" the defendants in their peaceable possession of the right, then and in that case the royalty should cease. The defendants covenanted that they would pay the royalty so long as they should continue to manufacture the machine. The defendants ceased to pay the royalty on account of alleged infringements of the patent within their territory.

Held, that the covenantors only bound themselves that B. should protect and defend the defendants within their territory as against persons having any right to manufacture or sell the patented machine within their own territory, and that they did not undertake that R. would prosecute with success all who wrongfully infringed the patent.

Held, also, that supposing there were a breach of the plaintiff's covenant the defendants might continue to manufacture the machine without paying the royalty, notwithstanding their covenant to pay the same as long as they continued to manufacture.

Geo. Morphy and W. Cassels. for the plaintiffs.

Bethune, Q.C. and W. Barwick. for the defendants.

EMERY v. EMERY.

Alimony—Separation—Wife's neglect to offer to return—Offering new evidence after close of trial.

The plaintiff and defendant were married in Toronto in 1859, the plaintiff having real property of about the value of \$4,000, while the husband had none. They lived together for a while in a house rented by the husband, but afterwards on the wife's property, and during the latter period they disagreed, and the wife, with threats of violence, ordered the husband out of her house, saying that she had enough to support her. He left her and lived in Montreal for some time, and subsequently near Toronto, and though they sometimes met there was no reconciliation. About ten years before action the defendant went to Minneapolis, in the United States, became domiciled there, and though the plaintiff knew of his place of residence, she never offered to return to him.

Held, that she was not entitled to alimony.

After the trial the defendant petitioned the Court to be allowed to give evidence of his domicile in the U. S. A., when proceedings were instituted there by him for a divorce, alleging that he had intended being present at the trial, but having heard that he would be arrested in Canada on a charge of bigamy he feared to come. In answer it was shown that the evidence which he now sought to give was contained in a commission which could have been used at the trial, but which his counsel refrained from putting in.

Held, that he was not entitled to offer the evidence.

IN CHAMBERS.

[THE CHANCELLOR, 18TH DECEMBER, 1882.]

In re ROBERTSON & DAGANEAU.

Vendors and Purchasers Act—Disputed contract.

Upon the presentation of a petition by the vendor, under the Vendors and Purchasers Act, it was objected that the contract was signed under

circumstances which would enable the purchaser to resist successfully an action for specific performance, and that the purchaser had made time of the essence of the contract, and that title had not been shown within that time.

Held, notwithstanding *re Henderson & Spencer*, 8 P. R. 402, that the proper course was to give liberty to either the vendor or purchaser to bring an action within three months for specific performance or to rescind the contract, and the order was made accordingly. Costs reserved to be dealt with in the action to be brought, or to be disposed of in this matter if no action brought.

Small, for the vendor.

H. Cassels, for the purchaser.

H. C.

CROKER v. NORRIS.

Mortgage—Payable at or before five years—Discharge.

A mortgage to the Accountant contained the proviso that the principal was "to be paid at or before the end of five years from the 23rd day of April, 1881." On the 4th January, 1883, the mortgagor caused the principal money and interest to be paid into court.

H. Cassels then moved for an order to discharge the mortgage, contending that the mortgagor had the right to pay off the mortgage before the expiration of the five years, without giving notice of his intention so to do, and without any payment of interest in advance, and he relied on *Harding v. Pingey*, 12 W. R. 684.

13th January, 1883, THE CHANCELLOR.—The case cited, *Harding v. Pingey*, justifies the payment being made at any time with interest up to the date of payment, and the payment already made of the exact amount into Court may stand.

H. C.

[PROUDFOOT, J., JANUARY, 1883.]

GOODFELLOW v. SHUTTLEWORTH.

Costs of day—Defendant attending trial—Material evidence.

Claim: damages for trespass to land. Defence: that the acts complained of were done on the defendant's side of the boundary between the plaintiff's and defendant's land. No specific boundary was alleged in the claim, but the plaintiff relied on a line run by one P. Two other lines had been run by R. and W. respectively. The defendant, in his depositions taken before trial, said he knew nothing about the lines except what he had been told, but that he had traced the lines run by B. and W. from the blazes. The trial was adjourned at plaintiff's request on payment of costs of the day. The defendant being a resident of the North West Territories swore that he had come to the trial for the sole purpose of giving evidence on his own behalf and not for the purpose of superintending the trial, and

that he believed that his evidence was necessary and material. His counsel certified that he would not have proceeded with the trial without the defendant's evidence. In taxing the costs of the day, the taxing officer refused to allow witness fees to the defendant, on the ground that he knew nothing about the boundary, and no other issue was before the Court, and therefore his evidence could not be material.

H. Cassels, for the defendant, appealed, and cited *Morison v. Harmer*, 5 Scott 410; *Evans v. Watson*, 4 Dowl. & L. 193; *Howes v. Barber*, 18 Q. B. 588; *Flower v. Gardner*, 3 C. B. N. S. 185.

Hoyles, contra, cited *Pilgrim v. Southampton Ry. Co.*, 8 C. B. 25; *Skelton v. Seward*, 1 Dowl. 411; *Potter v. Rankin*, L. R. 4 C. P. 76.

Held, reversing the ruling of the taxing officer, that it was premature for him to decide at this stage of the case, that no material evidence could be given by the defendant.

H. C.

In re SHEPPARD; WILSON v. SHEPPARD.

Administration—Intestacy—Mortgage of realty by heirs—Debts payable out of unencumbered shares.

Administration. Intestate died, 10th January, 1875. 12th November, 1878, mortgage on realty executed by widow and two adult children, and registered on 19th November, 1878; 10th March, 1879, proceedings begun in Surrogate Court, citing next of kin; 10th April, 1879, letters of administration granted to the plaintiff, a creditor; 5th June, 1879, order for administration by this Court on application of plaintiff. The only assets were the proceeds of sale of the realty.

The Master at Hamilton divided the estate amongst the heirs, after deducting costs and dower, though debts of the intestate remained unpaid. He allotted the mortgaged shares of the adult heirs to their mortgagees. The shares of the other heirs, of whom some were infants, were by this arrangement rendered subject to the debts, and were almost exhausted in paying them.

H. Cassels, for the plaintiff.

Geddes, for the mortgagees.

Langton, for an heir whose share is subject to debts.

J. Hoskin, Q.C., for infants.

8th January, 1883, FERGUSON, J. After considering the authorities to which I have been referred, I am of the opinion that the mortgagees took as against creditors of the intestate a good title, and the order may go for distribution according to the Master's report.

H. C.

RYMAL v. McEACHREN.

Action in Chancery Division—Notice of trial for next ensuing Assizes.

Notice of trial was served for Hamilton Winter Assizes to be held 3rd January, 1883.

H. Symons, for defendant, moved to set aside the notice, on the ground that the action being in the Chancery Division should be tried at the sittings of that Division, and that as sittings were always held in due course at Hamilton the notice was improper. He cited secs. 25, 45 and 46 of the Judicature Act, and Rules 263, 266, 392 and 393; and *Vermilyea v. Guthrie*, 2 C. L. T. 554.

G. M. Barton, contra.

28th December, 1882. THE MASTER IN CHAMBERS.—I have consulted with the Chancellor, and I think the notice is regular. No sittings of the Chancery Division have yet been appointed to be held in Hamilton for 1883, and such being the case, I think the plaintiff has a right to a trial at the January Assizes. In the ordinary course sittings will be appointed for a much later date, but I do not think the plaintiff is bound to wait until then. The application is refused; costs in the cause.

(Reported by H. Symons, Esq., Barrister-at-Law.)

NOVA SCOTIA.

Vice-Admiralty Court.

[Reported by James M. Oxley, Esq., Barrister-at-Law.]

[McDONALD, C.J., 30TH SEPTEMBER, 1881.]

THE MAGNOLIA.

Salvage from Fire—Services of Floating Fire-Engine and Fire Department.

The two barques, *M. J. K.* and *Magnolia* were lying out in the stream in Halifax Harbour, the former being ready to proceed to sea, and only awaiting orders, the latter laid up for the winter, and having only one man on board as watchman and ship-keeper. At about 2.40 a.m. on the morning of 4th February the look-out on board the *M. J. K.* discovered fire issuing from the *Magnolia*, and aroused the captain, who immediately called all hands up, and sent a boat off with the mate and five men. They found the vessel on fire aft, and took away the watchman to their own vessel. The captain himself with the mate and all the men that could be spared from the *M. J. K.* returned to the burning ship and put

forth every exertion to subdue the flames. They succeeded in retarding their progress, but could not have saved the vessel from ultimate destruction had not the fire been observed from the shore, and after the lapse of more than an hour a number of the city firemen came off in a steam-tug specially fitted up with fire-pumps by whose effective assistance the fire was soon put out. The owners, master and crew of the *M. J. K.*, and the owners of the steam-tug claimed remuneration as for salvage services. The firemen made no claim.

Held, that the services rendered were salvage services, that the owners of the *M. J. K.* were not entitled to receive anything as their vessel had not been in any wise imperilled, and that the amounts awarded to the others should be as follows: the *Magnolia* having been sold under directions from the Court realized \$1282.59; to the owners of the steam-tug, \$200; to the master of the *M. J. K.*, \$100; to the mate of the *M. J. K.*, \$40; \$10 to each of the eleven men, \$110; total \$450 with costs to be taxed.

Meagher, Q.C., for the *M. J. K.*

McCoy, Q.C., for the steam-tug.

Lenoir, Q.C., for the *Magnolia*.

[5TH DECEMBER, 1881.]

THE ANNIE M. ALLEN.

Abandonment of vessel—Non-completion of voyage—Right to freight, and general average.

The *Annie M. Allen*, on a voyage from Cuba to New York, laden with sugar and old iron, encountered heavy gales, and after every exertion to save her, in which she sustained great damage, was abandoned by her master and crew. Subsequently, a steamer fell in with her, and brought her into the port of Halifax. On giving security for the payment of such salvage, general average, etc., as might be decreed, the owner of the vessel was allowed to resume possession, and some days afterwards the owners of the cargo obtained their property on the same terms. The owner of the vessel notified the owners of the cargo that he intended to repair her forthwith, and complete the voyage with all possible despatch. The owners of the sugar, however, sold it in Halifax, and then the ship-owner refused or neglected to proceed with the voyage, although notified by the owners of the iron to do so, and the latter were compelled to forward it to its destination themselves. After settlement of the salvage suit, the ship-owner filed a claim against the owners of the cargo for freight under the charter party, and a general average contribution towards the damages sustained by the vessel previous to the abandonment.

Held, as to the *freight* on the authority of *The Cathleen* 2 Asp. Mar. Cas. 367, that by the abandonment the contract of affreightment was abrogated, and consequently no freight was recoverable. As to the claim for

general average, which was opposed on two grounds (i) that the Court had no jurisdiction; (ii) that the ship-owner's lien having been lost by the abandonment there was no claim to enforce,

Held, First, that the Court had jurisdiction to enforce a possessory lien for general average when it arose incidentally in the progress of a cause over which the Court had jurisdiction. Second, that although the master had indeed abandoned the vessel, yet as it was done solely for the purpose of saving life, and on her being brought into port the owner had received possession of her by order of the Court several days before the cargo was restored to its owners, and as the possession of the vessel by the salvors had not been adverse to the owner but in his interest and in his behalf, that the vessel had never been really out of her owner's legal possession so as to deprive him of his lien upon the cargo, and therefore his claim for general average should be allowed.

Ritchie, Q.C., *Advocate General*, and *Graham*, Q.C., for salvors.

Henry, Q.C., for owners of cargo.

Harrington, Q.C., for owner of vessel.

NEW BRUNSWICK.

In the Supreme Court.

[APRIL, 1882.]

THE MUNICIPALITY OF KENT v. McARTHUR.

Statutory title—Adverse possession—Public pound.

The Sessions of Kent County having in 1852 appropriated money for the erection of a pound in the Parish of Kent, it was by the verbal permission of the then owner erected on land, the documentary title to which was now in defendant, the understanding being that it was to be occupied as long as it was kept up, and was necessary and used as a public pound. The pound was used continuously from 1852 down to 1862, when it was allowed to get out of repair, and was not used again until 1872, when the Sessions repaired it, and continued to use it for several years, until defendant took possession, when plaintiffs (claiming through the Sessions) brought trespass.

Held, that plaintiffs had failed to make out a statutory title by twenty years possession.

ARMSTRONG AND WIFE, APPELLANTS, v. MCGOURTY, RESPONDENT.

Trespass—Purchaser under registered deed—Whether actual entry necessary to maintain trespass—Title to land—County Court—Remitting case to Supreme Court.

In an action of trespass *quare clausum fregit* by A. and wife, it was shewn that the *locus in quo* consisted of a vacant lot of land in St. John, formerly owned by one H. Some time in March, 1878, H. gave defendant permission to pile stone on the lot, and he fenced it in and used it for that purpose. H. stated on the trial that he told defendant he could have the use of the lot till he wanted it to build on; while the defendant swore that he took it by the year. On cross-examination, he said he was to have it for not less than a year.

H. having become insolvent, this property was purchased from his assignee by the female plaintiff by deed dated 10th April, 1870, registered 15th of the same month. A. being desirous of building requested defendant to remove the stone, a large quantity of which was still there. Defendant at first promised to do so, but subsequently refused and continued in possession, whereupon the present action was brought. On the trial in the Saint John County Court, A. stated that he went into possession after buying the property, but he did not state the nature or acts of possession, nor was he cross-examined on this point. At the close of plaintiff's case defendant's counsel moved for a nonsuit on the grounds—1. That the action should not have been brought in the County Court, the title to land being brought in question. 2. That defendant was tenant from year to year and there was no notice to quit. 3. Even if defendant's holding was for a year certain which had expired, plaintiffs could not maintain trespass against him without actual entry and demand of possession. Leave was thereupon reserved to enter a nonsuit and a verdict for plaintiffs taken by consent. Subsequently at Chambers, the County Court Judge granted a nonsuit on the third ground, and against this order the plaintiffs appealed.

Held, by Weldon and Wetmore, JJ., that under the Consolidated Statutes, cap. 74, sec. 12, a purchaser under a registered deed is not obliged to make an actual entry in order to maintain trespass; but even if so, there was evidence for the jury of an entry in this case.

Held, by Weldon, Wetmore, Palmer and King, JJ., that the title to land was brought in question, and that the judge should not have nonsuited plaintiffs, but should have remitted the cause to the Supreme Court under Consol. Stat. cap. 51, section 45. But,

Held, by Duff, J., that the title to land did not come in question, and that the nonsuit was right.

**WEST, APPELLANT, v. THE TRUSTEES OF SCHOOL DISTRICT
No. 5. PARISH OF JOHNSTON, RESPONDENTS.**

Mandatory—Injunction—Common Schools Act—Summary remedy.

Held, by Palmer and King, JJ., on appeal from the decision of the former made in Equity, granting a mandatory injunction in this cause, that where a person who has been Secretary to a Board of School Trustees, on being dismissed, refuses to give up the records and other property of the Corporation, the Court of Equity has jurisdiction to grant a mandatory injunction to restrain him from retaining such property; but,

Held, by Weidon and Wetmore, JJ., that sec. 92 of the Schools Act, (Consol. Stat. cap. 65,) has provided a summary remedy by application to the Inspector, and that that remedy should be pursued.

Held, by Allen, C.J., that there might be cases where the remedy given by sec. 92, would be inadequate, as where a secretary of a district had a considerable sum of school money in his possession, which he refused to account for or give up, but as it was by the bill and not by argument or objections on the motion for the injunction that the right of plaintiffs to institute the suit must depend, and as there was no allegation in the bill that the books and papers which defendant refused to delivered up were of such a character and value as to require the interposition of a Court of Equity, or that there were special circumstances in the case requiring the interference of the Court, he thought the plaintiffs should have resorted to the remedy provided by sec. 92, and the injunction ought not to have been granted.

STEPHENSON, *et al.* APPELLANT v. HAYWARD, RESPONDENT.

Judgment—Summons for new trial not disposed of—Irregularity.

A judgment signed pending a summons for a new trial which did not contain a stay of proceedings, and on which no action had been taken for a long time after the return, but which had not been argued or disposed of, will not be set aside as irregular.

LYON v. BARNES.

Commencement of action—Nisi Prius Record—Sufficient proof.

In an action against a Justice of the Peace, **Held**, that the statement of the time of issuing the summons contained in the *Nisi Prius* record was sufficient proof of the commencement of the action.

DIFFIN v. DOW.

Evidence—Expert—Opinion involving truth of evidence.

In an action against a surgeon for malpractice in operating upon plaintiff's eyes, the defendant being called as a witness by the plaintiff, described the condition of the plaintiff's eyes before and at the time he operated, and stated the nature of the disease, and the treatment he adopted. The plaintiff and other witnesses described the gradual loss of the plaintiff's sight, and his condition before and at the time of the operation. Medical witnesses who heard the evidence stated that the disease was not such as the defendant described it to be, but of an entirely different character. A witness skilled in the diseases of the eye, who had heard the testimony of the defendant and the other witnesses, was asked (*inter alia*) the following question:—"Is the statement of the medical case as given by the defendant in evidence, reconcilable with the facts (assuming them to be true) as given by the other witnesses?"

Held, that the question was improper as the answer to it would involve an opinion by the witness not only as to the truth of what the other witnesses had sworn to, but also the meaning of the words they had used.

REGINA v. RISTEEN.

REGINA v. BURTT.

Canada Temperance Act—Order in Council—Evidence—Information.

Held, following *ex parte Russell* that before a person can be legally convicted of selling liquor under "The Canada Temperance Act, 1878," it must be proved before the magistrate that the second part of the Act is in force, by the production of the *Canada Gazette* containing the proclamation. Palmer and King, JJ., felt themselves bound by *ex parte Russell*, though but for that case they would have held that the Court was bound to take judicial notice of the Act being in force.

Held, by Duft, J., that the information under the Act must be taken before two Justices although one may sign the summons.

SHEHYN v. MILLIKIN *et al.**Motion paper—Notice of motion.*

A notice under Rule 2, Hilary Term, 6 Wm. 4, that a rule *nisi* would be moved for, is irregular; and the Court will not hear the motion though the affidavits have been served, and notice of motion given and the cause entered on the motion paper.

[AUGUST, 1882.]

MCLELLAN, APPELLANT, AND RAKINE, RESPONDENT.*County Court appeal—Dismissal of—Rule 2, Mich. T. 40 Vict.*

If the appellant in a County Court appeal does not appear when the case is reached on the paper the respondent may move to dismiss it with costs, and is not obliged to wait until a common motion day. (Wetmore, J. dissenting).

KERR, APPELLANT, AND STEEVES, ET AL RESPONDENTS.

(Equity Appeal.)

Assignment of debt—Suit by assignee in Equity—Pleading.

The assignee of a debt brought a suit in equity for the recovery of it against the debtor and the assignor, alleging as the reason for not proceeding at law, that he had requested the assignor to have an action at law brought in his (the assignor's) name for the recovery of the debt for the benefit of the plaintiff, and that the assignor had refused to have such action brought. A demurrer to the bill for want of equity having been overruled.

Held, on appeal, by Palmer and King, JJ., (Allen, C.J., doubting) that the allegation in the bill was sufficient, as it was capable of the meaning, that the plaintiff had requested the assignor of the debt to allow an action to be brought in his name for the recovery of it, and that the assignor had refused to allow it.

ROSS AND WIFE v. THE TOWN OF UPPER MILLS.*Overseer of the poor—Town of Upper Mills—Proper parties to action for support of illegitimate child.*

In an action to recover for the maintenance of an illegitimate child under an agreement with the overseer of the poor, brought against the Town of Upper Mills,

Held, that the overseer of the poor for the town was a corporation sole, and for the breach of any contract made with him for the support of the poor of the town, the action should have been against the corporation and not against the town.

SAÏRE v. HARRIS.

(Equity Appeal.)

Injunction—Restraining action at law—Discretion of Judge.

A bill in equity was filed to obtain a decree of partnership between the plaintiff and defendant, and for an account; and an *ex parte* injunction was obtained restraining the defendant from interfering with the plaintiff (*inter alia*) in making the assets available for payment of the debts. The defendant denied the partnership. Before the hearing, the plaintiff collected money belonging to the alleged partnership, which he appropriated to his own use, whereupon the defendant brought an action against him to recover the money. On an application by the plaintiff for an injunction to restrain that action,

Held, that the Judge, in granting it, was justified in requiring the present plaintiff to pay the money into Court.

EX PARTE SIMPSON.

Review—Certiorari—Costs.

In an action in a Parish Court, where the plaintiff's claim exceeds the amount over which the Court has jurisdiction, he may, by abandoning the excess upon the particulars filed, bring the case within the jurisdiction of the Court.

Where the plaintiff in an action of debt in a Parish Court was improperly nonsuited—no evidence having been given by the defendant,

Held, per Wetmore and King, JJ., (Palmer J., dissenting) that a Judge on review had power to order judgment to be entered for the plaintiff for the amount proved on the trial.

Held, per Weldon, J., that an order of a Judge of a County Court in a case of review was final, and that a *certiorari* would not lie to remove it into this Court. Per Wetmore and King, JJ., that a *certiorari* would lie in such a case. Per Palmer, J., that though the order of the Judge of the County Court was wrong, if he had jurisdiction to make it, a *certiorari* would not lie to remove it into this Court.

The Court has no power to grant costs in discharging a rule *nisi* for a *certiorari*, unless such power is given by statute.

McDONALD v. POTTS.

Judgment—Irregularity—Delay in moving to set aside—Waiver—Affidavit of merits.

In July, 1881, an order for security for costs was obtained by defendant with a stay of proceedings till security given. On the 5th September the plaintiff's attorney sent the defendant's attorney a bond for security for costs, with a demand of plea, but the time for pleading not having expired, he sent another demand on the 27th September. No plea having been delivered, the plaintiff's attorney soon afterwards asked the defendant's attorney if he had received the bond, and if it was right, and if he intended to plead, and he swore that he understood the defendant's attorney to say that the bond was sufficient and that there was no defence in the action; and in consequence of this he signed interlocutory judgment on the 29th November, and final judgment on the 21st December following; and that before signing final judgment he told the defendant's attorney that the interlocutory judgment was signed. On an application to set aside this judgment for irregularity, it appeared that there was an error in the bond, the condition being that the plaintiff should pay *such costs as the defendant should be liable to pay in case he should discontinue, &c.* The affidavit of the defendant's attorney denied that he had told the plaintiff's attorney that the bond was sufficient, or that there was no defence to the action. He admitted that the plaintiff's attorney had told him that interlocutory judgment was signed in the action, but stated that for certain alleged reasons he did not believe it, having searched the clerk's office in the latter part of October. In the latter part of March following, the defendant's attorney searched again and discovered that interlocutory judgment had been signed in November previous. Upwards of a month after this he applied to set it aside for irregularity, or to be let in to defend on the merits. The defendant's affidavit stated that he had as he believed "a good defence to the action on the merits."

Held, (Palmer, J., dissenting) that the application was too late, the plaintiff having lost a trial.

Per Allen, C.J., Wetmore and King, JJ., that it was the duty of the defendant's attorney, when told that interlocutory judgment had been signed, to search, and not having done so, but having allowed two terms to elapse before applying to set aside the judgment, it was too late.

Per Weldon and Wetmore, JJ., (Palmer, J., dissenting), that it was the duty of the defendant's attorney, if he considered the bond for security for costs defective, to have returned it to the plaintiff's attorney or to have notified him of the objection to it, and his omitting to do so was a waiver of the objection.

Per Wetmore, J., that the defendant's affidavit, stating his belief that he had a good defence on the merits, was insufficient. (Palmer, J., dissenting).

MAYOR OF ST. JOHN, APPELLANT, & PATCHELL, RESPONDENT.

Policeman—St. John—Power of Common Council to reduce pay—Month's notice required.

Respondent was appointed a policeman for the city of St. John under the Act 19 Vict. cap. 52. By the Act the number of the policemen is fixed by the common council, but the selection and appointment of them are vested in the Chief of Police, under whose direction and control they are, and who has power to dismiss or suspend them from employment, if he thinks them negligent, or otherwise unfit to discharge their duties. No policeman is at liberty to resign his office without the written permission of the Chief of Police, unless he gives the chief a month's notice in writing of his intention to resign. The 5th section of the Act declares that the wages and pay of the policemen shall, from time to time, be determined and settled by the common council, and shall be paid monthly, by order of the common council upon the Chamberlain, out of the funds in his hands applicable to the support and maintenance of the police establishment.

Held, that the Act imposed on the corporation of St. John a statutory duty to pay the policemen their wages, and action would lie for the recovery thereof.

Held, also, by Allen, C.J., and Weldon and King, J.J., that, although the common council have power to reduce a policeman's wages, yet they can only do so on giving a month's notice.

Held, by Wetmore, J. (Palmer, J., being also rather inclined to the same view), that when a policeman is once appointed at a certain rate of wages, the common council has no power to reduce his pay.

MANITOBA.**In the Queen's Bench.**

(Reported by F. Beverley Robertson, Esq., Barrister-at-Law.)

(EASTER TERM, 1882.)

McLAREN v. HALSTED.

*Agreement to form syndicate—Misrepresentation—Rescission of agreement—
Damage—Demurrer.*

In a bill to set aside an agreement, whereby plaintiff joined a syndicate and became the owner of an undivided one-tenth interest in certain lands for the purpose of sharing in the profit arising from the sale of the lands as city lots, it was alleged that the plaintiff was induced to join the syndicate and purchase a 1/10 interest in the lands at a certain price by the defendant's fraudulent misrepresentation that two other persons of exceptional business ability and sound judgment, in whose judgment the defendant well knew the plaintiff had great and special confidence, had previously joined the syndicate on the same terms. whereas in truth those persons had agreed to pay only a little more than half the price paid by the plaintiff; but it continued no allegation that the land was not worth the price the plaintiff paid for it or anything to shew that the plaintiff had been misled to his *damage*, except that he had been induced by the misrepresentation to enter into a contract into which he would not have entered had he known the truth. Demurrer thereto.

Held, reversing the decision of Dubuc, J., who had allowed the demurrer that the bill sufficiently shewed damage; and that the misrepresentation was not mere *gratis dictum*, but a misrepresentation of a material fact upon which the plaintiff was entitled to rely in forming his judgment of the bargain offered him. Dubuc, J. adhered to his former opinion.

J. S. Ewart, for the demurrer.

F. Beverley Robertson, contra.

SINNOT v. SCOBLE.

License to cut timber on Dominion Lands—Exclusive possession—Selection of timber—Injunction.

Held, per Wood, C.J., that under the second proviso of sec. 52, s-s. 10, of the Dominion Lands Act, the Governor-General in Council, has no power to grant a license to cut timber for any term less than a full year.

Per Dubuc, J. Even if the Governor-General in Council had power to grant such a license, the plaintiff's license did not confer the right to *exclusive* possession of the lands described in it.

Per Miller, J., (who adhered to his opinion expressed at the hearing). The plaintiff's license, which was a license to cut certain specified quantities of timber, dated 1st November and expiring on 1st May following, was authorized by the statute, and, by the operation of the statute, conferred on the plaintiffs the right to keep *exclusive* possession of the lands described in it, until they had cut (not later than 1st May) the quantities of timber specified; as naturally flowing from the right to keep *exclusive* possession the plaintiffs had the right to *select* their timber from all that was on the land, and that they were entitled to an injunction restraining the defendants from cutting timber thereon.

F. Beverley Robertson, for the plaintiffs.

T. S. Kennedy, for the defendants.

[DUBUC, J., SEPTEMBER, 1882.]

MCLAREN v. HALSTED.

Action at law—Injunction on equity side.

Upon a motion on the equity side of the Court for an injunction to restrain an action at law on the common law side,

Held, notwithstanding the wide expressions of the learned C.J., in *Boulton v. Shore*, see 2 C. L. T. 428, and *Livingstone v. Bethune*, 3 C. L. T. 47, that the motion was properly made here, and not in the common law suit, and the injunction was granted as prayed.

F. Beverley Robertson, for the motion.

J. S. Ewart, W. Redford Mulock, and Dingman, contra.

THE
CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

In the Court of Appeal.

IN CHAMBERS.

ST. JOHN v. RYKERT.

Certificate of Judgment in Appeal—Amendment of—Making order of Court below.

Where the certificate of a judgment of the Court of Appeal does not truly state the decision of the Court, it will be amended, though it has been made a rule or order of the Court appealed from.

It is not necessary to make such a certificate a rule or order of the Court *a quo*. The appeal is a step in the cause, and the decision is a judgment in the cause, is certified by the officer of this Court to the officer of the Court below, and should be acted upon by that officer in the exercise of his ordinary ministerial functions in the same way as an order made on rehearing by the Court appealed from.

Bethune, Q.C. applied to have the certificate of the judgment of the Court of Appeal corrected in one passage, which was said not to give the effect of the judgment as pronounced, or at all events was open to misconstruction.

Ewart, contra, took the preliminary objection that there was no power to review or change the certificate except by appeal to the Supreme Court of Canada.

PATTERSON, J.A., 20TH NOVEMBER, 1880.—For the purpose of discussing this preliminary objection, we must of course assume that the certificate misstates the judgment, just as if it had declared that an appeal was dismissed when the judgment had been that it was allowed. The practice of the Court would be in a very faulty condition if such a slip could not be corrected.

The certificate has been made an order of the Court of Chancery, which circumstance is relied on as showing that it has passed beyond the control of this Court; and Mr. Ewart has referred us to the exposition of the rules respecting rehearing of questions, or correction of mistakes, before the Judicial Committee of the Privy Council or the House of Lords, by Lord Brougham, in the case of *Rajundernarain Rae v. Bigai Govind Sing*, 1 Moo. P.C. 117, and the numerous cases cited in (addition to those referred to by Lord Brougham) by the learned reporter in a note appended to his report. In one passage of his judgment, Lord Brougham uses this language:—"It is unquestionably the strict rule, and ought to be distinctly understood as such, that no cause in the Court can be reheard, and that an order once made, that is, a report submitted to His Majesty and adopted by being made an order in Council, is final, and cannot be altered. Whatever, therefore, has been determined by the Court must stand, there being no power of rehearing for the purpose of changing the judgment pronounced; nevertheless, if by misprision in embodying judgments, errors have been introduced, the Court possesses by Common Law the same power which the Courts of Record and Statute have of rectifying the mistakes that have crept in. The Courts of Equity may correct the decrees made while they are in minutes; when they are complete they can only vary them by rehearing; and when they are signed and enrolled they can no longer be reheard, but they must be altered, if at all by appeal. The Courts of Law, after the term in which the judgments are given, can only alter them so as to correct misprisions, a power given by the Statutes of Amendments. The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority."

Mr. Ewart in his argument treated this judgment as indicating that a more liberal use was made of the power of amendment by the Judicial Committee and the House of Lords, because they were Courts of last resort, than was recognized as permissible in Courts from which an appeal lay. I find, however, that in Macpherson's Privy Council Practice, where the judgment relied on by Mr. Ewart is quoted at some length, the fact that the Judicial Committee is a Court of last resort is given as the reason why it is not considered expedient that a cause once fully heard and determined should be permitted to be discussed again.

But the rule against reconsideration or alteration I understand to apply only to a change in the judgment delivered by the Court, or the opinion agreed upon as the final decision of the Court, and not in any way to

the correction of mistakes which may happen in formally drawing up of the certificate or order in which the decision is to be embodied.

I should take the doctrines enunciated by Lord Brougham rather to support than to cast doubt upon the power or propriety of rectifying errors to make the formal note a true record of the judgment actually delivered, even if the relation of this Court to the Courts from which appeals to it lie, resembled that of the House of Lords or Privy Council to the Courts whose judgments they review; but I do not think there is so close an analogy as to make the practice of those august tribunals a rule to be necessarily followed by us. We have to look to the Act respecting the Court of Appeal, R.S.O. cap. 38, as our guide. We find in it the express enactment, which relates to appeals from the Court of Chancery, as well as to those from Common Law Courts, (sec. 31) that the appeal shall be a step in the cause or matter in which the judgment complained of was given; and we find also (sec. 23) that the Court has power to give any judgment, and make any decree or order which ought to have been made, and to direct the issue of any process or the taking of any proceedings in the Court below; and (sec. 44) that the decision of the Court of Appeal shall be certified by the Registrar of the Court of Appeal to the proper officer of the Court below, who shall thereupon make all proper and necessary entries thereof, and all subsequent proceedings may be taken thereupon as if the decision had been given in the Court below.

I am not aware of any reason or necessity for making the certificate an order of the Court of Chancery; or that that proceeding is attended with any particular effect. I understand the decision to be a judgment in the cause, which should be acted on in the same way, and by the same machinery, as an order made on rehearing by the Court of Chancery itself. The certificate is not from this Court to the Court below; it is from the Registrar of this Court to the officer of the Court below, who is to act upon it in the exercise of his ordinary ministerial functions.

It is to be a certificate of the decision of the Court. If the decision has not been certified, but by mistake the Registrar has certified something which was not the decision, it seems to me that not only is there nothing to prevent our directing him to make right what is wrong, but that obedience to the statutes requires us to see that the decision is truly stated. The objection is therefore overruled.

See the case in the note to *Tomney v. White*, 3 H.L.C. 70.

High Court of Justice.
QUEEN'S BENCH DIVISION.

WHITEHEAD v. TAIT.

Verdict for amount within Division Court jurisdiction—Costs—Rules 428, 512.

In an action of damages, the plaintiff succeeded as to part, and recovered a verdict for \$50; he had sustained other damage, but the jury negatived the defendant's liability therefor. There was no question raised which might not have been tried in the Division Court.

Held, that he was exhibited to Division Court costs only.

In this action, which was tried before Patterson, J.A., and a jury at Barrie on the 9th and 10th of May, 1882, the plaintiff complained that his land had been flooded by the effect of a dam constructed for lumbering purposes across a creek, and by a slide or dam more recently built lower down the creek. The lower dam was built by the defendant. The upper one was not built by the defendant; but he had acquired the timber limits on the waters above it; and it had been used by him for the two seasons of 1880 and 1881. The plaintiff besides claiming damages, asked for an injunction to restrain the repetition of the injury he complained of; but the defendant had, before action, parted with the mill and limits, and therefore nothing turns on the claim for the injunction.

The jury found specifically that no damage had been done to the plaintiff by the lower dam; that no damage had been occasioned to him by the upper dam in 1880, through any act of the defendant, but that damage had been done to him in 1881, by the acts of the defendant's servants, in connection with the upper dam, and for this damage they rendered a verdict for fifty dollars.

Pepler moved for a certificate for costs.

PATTERSON, J. A., 26TH JULY, 1882.—I reserved my decision principally for the purpose of considering the case of *Orok v. Garvin*, 5 P. R. 169, on which Mr. Pepler relied as an authority in favour of the plaintiff's title to a certificate, notwithstanding the fact that no question of property or of right was raised on the pleadings, or at the trial.

Rule 428 of the Judicature Act provides that when any action or issue shall be tried by a jury the costs shall follow the event, unless upon application made at the trial for good cause shown, the Judge shall otherwise order.

No cause was shown in this case why the costs should not follow the event. The plaintiff is therefore entitled to his costs; but upon what scale?

Rule 428 does not touch the question of scale. Some doubts as to this arose from what was said in the case of *Garnett v. Bradley*. L. R. 3 App. Cas. 944; and, to set them at rest, Rule 512 was made, which expressly

affirms the continued application of the provisions of the C. L. P. Act to the taxation of costs in cases like the present.

Under the Division Court Act, 1880, the verdict for \$50 is within the jurisdiction of the Division Court. The action might therefore have been brought in the Division Court.

I think, however, that the plaintiff had reasonable grounds for believing he had the right of withdrawing the cause from the Division Court and bringing it in the Superior Court, because I am satisfied that the dam had occasioned him damage beyond that for which the jury awarded the \$50; while I am at the same time of opinion that the verdict is for as large an amount as could be reasonably charged against the defendant, who did not build the dam, which is on land not owned by the defendant, but as far as I know, public land. The defendant merely used the dam while running his saw logs, putting in stop logs for the occasion, and thus creating more obstruction than what was caused by the main structure.

I am further of opinion that the defendant, without just reason, defended the action, so far as it related to his use of the upper dam in 1881. In respect of the other two charges, the action was rightfully defended.

I have some doubt whether the circumstance that the action was, with just reason, defended, as to part of the plaintiff's claim, does not take it out of the second sub-section of sec. 347 of the C. L. P. Act. There are certainly reasons for saying that a certificate that the defendant, without just reason, defended the action would, under the circumstances, be scarcely warranted.

But I do not see on what grounds the plaintiff can ask for a more favourable certificate than that provided for in the second sub-section, viz., that he had reasonable ground for believing he had the right of withdrawing his cause from the Division Court and bringing it in the Superior Court, and that the defendant without just reason defended the same. Under that certificate he will tax his costs on the Division Court scale, without right of set-off by the defendant, except of his costs of the issues on which he succeeded.

To entitle the plaintiff to *full* costs, I should have to certify, under the first sub-section, to the effect that the cause was a fit cause to be withdrawn from the Division Court, and to be brought in the Superior Court. I do not see my way to that conclusion. As far as the expectation of recovering an amount beyond the inferior jurisdiction is concerned, I take it that the case is correct, and is intended to be covered, by the second sub-section.

One is apt to feel inclined to say that actions for injuries to land, either by trespasses, or as the consequences of such acts as backing water, ought to be tried in a Superior Court, and undoubtedly that is the case when *rights* come in question. But when we find the Legislature giving jurisdiction in *all personal actions* where the amount claimed does not exceed sixty dollars—increasing the jurisdiction by one half—as a measure of public policy, passed in the interest of the community, I do not feel at liberty to say that certain classes of personal actions are excluded, or that

a particular action is fit, not by reason of anything special in its circumstances, but because it belongs to a class, to be withdrawn, at the expense of the defendant, from the inferior and brought in the Superior Court. Whatever special circumstances there are in this case tell against visiting the defendant with greater costs than the verdict will carry; because, as he was no longer doing the acts complained of, and as he never owned the dam, and had ceased to own the mills and limits, the only question to be settled with him was damages.

The very eminent judge who decided the motion in *Orok v. Garvin*, Sir Wm. Richards, seems to have thought that, on the grounds on which the judgment proceeded in *Shuttleworth v. Cocker*, 1 M. & G. 829, and *Morrison v. Salmon*, 2 M. & G. 390, a certificate that the action was really brought to try a right would be proper although the right was not denied upon the record. So far, I am not disposed to differ from him. The question whether the action was *brought* to try a right beyond the right to damages, may very well be held not to be concluded by the subsequent accident of the right being or not being brought in question. From the closing remarks, at pp. 174-5, his lordship gives reason to suppose that if the law had been in force, which since the delivery of that judgment provided for the removal of causes by *certiorari*, when questions involving the jurisdiction of County Courts were raised (33 Vict. cap. 7, sec. 10), he might have taken a different view of what justice required in the case before him.

I am not able, however, to follow the reasoning by which the circumstance that an action is brought to try a right, beyond the right to damages, is applied to the *scale* of costs. Under our original C. L. P. Act (19 Vict. cap. 43, sec. 312, C. S. U. C. cap. 22, sec. 322), as under the Imperial Act (3 & 4 Vict. cap. 24, sec. 2), which was in question in *Shuttleworth v. Cocker*, the effect of the absence of the certificate was that the plaintiff got *no costs*. The certificate gave him costs, but did not touch the scale. Its effect was to leave him just where he would have been if the clause which deprived him of costs in case of his recovering less than forty shillings had not been passed. Having the certificate he was entitled to tax his costs; but the amount, when other statutory provisions existed in relation to it, was governed by those provisions. Thus it was held in *Evans v. Rees*, 9 C. B. N. S. 391, in the same Court in which *Shuttleworth's case* was decided, that in an action for slander, when the verdict was under forty shillings, the Statute 21 Jac. 1 cap. 16, sec. 6, prevented the recovery of more costs than damages, notwithstanding a certificate under 3 & 4 Vict. cap. 13, sec. 2.

Upon the whole, my conclusion is that the plaintiff having recovered all the damages for which the defendant is liable, and no question having been raised which might not have been tried in the Division Court, on which jurisdiction, beyond the amount recovered, has been conferred by the legislature, there is no reason why the defendant should pay greater costs than those appropriate to that jurisdiction.

I certify to entitle the plaintiff to Division Court costs, feeling that I am probably going further in his favour than he is strictly entitled to, having

regard to the fact already alluded to, that the defendant would have done himself injustice if he had let the action go undefended ; and to the fact, that the plaintiff's expectation of a larger verdict was based on his estimate of damages for which the defendant has been held not liable.

[OSLER, J., 3RD FEBRUARY, 1883.]

SCRIBNER v. KINLOCK.

THE SAME v. McLAREN.

THE SAME v. PATERSON.

*Stock-in-trade—Sale—Vendor employed as Clerk—Immediate delivery—
Change of possession—Chattel Mortgage Act.*

M. carried on a retail business in premises known as the Star House from a design over the door, but there was nothing to indicate who the proprietor was. Being in difficulties he sold the stock-in-trade to plaintiff in August, and formally handed over to him the keys, and the plaintiff took possession the next day. It became a matter of notoriety in the neighbourhood that the business had changed hands. M. was temporarily employed as salesman, and remained as such until 1st October ; but the plaintiff was continually about the shop. The stock was seized on 3rd October under writs of execution against M. The transaction was found to have been in good faith, and for valuable consideration.

Held, that the delivery was an immediate delivery within the meaning of the Chattel Mortgage Act ; but that there was no such actual and continued change of possession as to dispense with the necessity for a bill of sale.

The cases of assignments for the benefit of creditors, where the goods are allowed to remain in the assignor's premises, or where the assignor or his former clerk is employed by the trustee as a clerk, distinguished ; such acts being consistent with the object of the sale.

S. Smith, Q.C., and W. Kerr, Q.C., for the plaintiff.

H. Cameron, Q.C., Dougall, Q.C., and Ketchum for the several defendants.

NEW BRUNSWICK**In the Supreme Court.**

[JUNE, 1882.]

BARRY, ASSIGNEE V. LOGAN, et al.

Insolvent Act of 1875—Sec. 30—Bill of sale—Validity of—Evidence of Insolvency.

In order that a bill of sale of a trader's goods shall be held to be void under section 130 of the Insolvent Act of 1875, it must be shown that the debtor making it was at the time unable to meet his engagements, and it is not enough that he was in the habit of renewing his promissory notes as they fell due.

GILLIS, APPELLANT V. MORRISON, RESPONDENT.

Landlord and tenant—Lease of unfurnished house—No implied contract that it is tenantable—Rent payable in advance—Action for use and occupation—Evidence.

On the demise of an unfurnished house there is no implied contract that the premises are in a tenantable condition.

Where on the demise of premises, the rent is made payable in advance, an action for use and occupation will lie as in other cases, after the term is up.

The tenant cannot by writing a letter accompanying the key of the premises, stating his reasons for giving up the premises, make evidence for himself by having the contents of the letter admitted in evidence, in an action brought to recover the rent.

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WAYS OF NECESSITY BY IMPLIED RESERVATION, EXCEPTION, OR RE-GRANT.

THOUGH it cannot be said to be a matter of doubt upon the authorities directly bearing upon this branch of the subject, that a way of necessity is impliedly reserved where a man grants away all the land surrounding his close, yet authorities—and very respectable authorities—are to be found to support the opposite view; and we submit that it is a fair subject of debate whether the current of direct authority which now tends towards the affirmative of the proposition is due to any exact principle.

So many cases are to be found in which it has been taken for granted that such a way exists, and so many, in which it is expressly decided that such a way exists, that it would be useless to cite them. We content ourselves with referring to several representative cases. In *Holmes v. Goring* (a) it was distinctly asserted that the way arose by implication. Best, C.J., said, “If I have four fields, and grant away two of them over which I have been accustomed to pass, the law will presume I reserve a right of way to those which I retain: but what right? The same as existed before? No; the old right is extinguished, and the new way arises out of the necessity of the thing.” This case has been so often cited that its authority is undoubted.

(a) 2 Bing. 76.

In *Davis v. Sear* (b), decided in 1869, the defendant took an assignment of part of a leasehold property upon which buildings were being erected. At the time, he saw or could have seen the plans, and a plan was annexed to his deed, and an archway with paved way was standing complete on the land assigned to him. At the time of the assignment to him there was access to certain mews across lands of the assignor, but the plan of the proposed buildings showed that, when completed, they would shut off all means of approach to the mews except through the archway. It was held that the assignor had reserved by implication a way of necessity to the mews by means of the archway which he had parted with to the defendant. Lord Romilly, M.R., in giving judgment, said, "In that state of things it is contended that to argue that the way through the archway was a way of necessity is absurd, as other means of access could be and were used; but notwithstanding the apparent plausibility of this argument, I am of opinion that this is and was a way of necessity; that it was apparent that it was, that the defendant had notice that it was, and that it is not in his power to dispute that it was. In the first place, he saw distinctly the archway; he bought the house subject to the subway; for what purpose did he suppose that the archway was made, unless as a mode of access? * * * When all this is done, he says this way may be a way of necessity now, but till the buildings and houses were completed it was not so, you might have driven across the fields, and therefore I had no notice. I think that this is not language which a Court of Equity will allow a defendant, situated in the position of this defendant, to use."

The City of London v. Riggs (c) was decided in 1880. Sir George Jessel, M. R., in giving judgment, treats the question as beyond dispute. The main question in the case was as to the mode of user of a way of necessity—a new point—and the case did not turn upon the existence of the right. The learned Master of the Rolls, however, declares

(b) L. R. 7 Eq. 427.

(c) L. R. 13 Chy. Div. 798.

the law as follows:—"The right to a way of necessity is an exception to the ordinary rule that a man shall not derogate from his own grant, and the man who grants the surrounding land is in very much the same position as regards the right of way to the reserved close as if he had granted the close, retaining the surrounding land. In both cases there is what is called a way of necessity; and the way of necessity, according to the old rules of pleading, must have been pleaded as a grant, or where the close is reserved, as it is here, as a re-grant."

In *Turnbull v. Merriam* (d), the question is treated as a settled one upon the authorities. In that case it appears that H. owned a piece of land from which he used to pass by sufferance over R.'s land, on the east, in order to reach the highway. He could get out of his own land by a lane on the west. He conveyed to M. a piece between what he retained and the lane, thus leaving himself no rightful means of access to the highway, unless he had one over M.'s land. He then conveyed to the plaintiff a piece of what he had retained lying to the extreme east of his land and adjoining R.'s land. R. closed up his land and shut out all access to the highway from that point, and it was held that the plaintiff had a right of way of necessity over M.'s portion to the lane.

In the well considered case of *Wheeldon v. Burrows* (e), the authorities are gathered up and their effect is shortly stated as follows:—"In the case of a grant you may imply a grant of such continuous and apparent easements or such easements as are necessary to the reasonable enjoyment of the property conveyed, and have in fact been enjoyed during the unity of ownership, but with the exception which I have referred to of easements of necessity, you cannot imply a similar reservation in favour of the grantor of land." Lord Justice Thesiger, who delivered the judgment from which we have quoted, referred to Baron Martin's judgment in *Pinnington v. Galland* (f), where he says, "It no doubt

(d) 14 U. C. R. 265.

(e) L. R. 12 Chy. Div. 31, at p. 58.

(f) 9 Ex. at p. 12.

seems extraordinary that a man should have a right which certainly derogates from his own grant; but the law is distinctly laid down to be so, and probably for the reason given in *Dutton v. Taylor* (g), that it was for the public good, as otherwise the close surrounded would not be capable of cultivation."

These cases are open to criticism. Lord Romilly, in *Davis v. Sear*, bases his judgment almost entirely on the ground that the servient owner had notice that his grantor's land could not be approached except by a way leading over the land conveyed. Lord Justice Thesiger merely states the law to be that easements of necessity are by law impliedly reserved in the cases under consideration, and cites with approval, *Pinnington v. Galland*, though without expressly adopting Baron Martin's reason for the law. And Baron Martin places it upon grounds of public policy, grounds whose existence was practically denied two years later by his own Court in *Proctor v. Hodgson* (h), where it was held that when a landlocked parcel of land escheats, no way of necessity exists because no grant can be implied. Now the reason of public policy applies just as much to the case of escheated land as to any other case. If we may look upon the latter case as disposing of the public policy grounds, *Pinnington v. Galland* is disposed of; and so is as much of Lord Justice Thesiger's judgment in *Wheeldon v. Burrows* as relies upon it.

We are left with Lord Romilly's doctrine of notice, and the cases which assign no reason for the law save the similarity of the circumstances to those of a grant of a landlocked parcel. It is easy to conceive cases to which the doctrine of notice will not apply at all. Indeed, but for the plans in *Davis v. Sear*, the question of notice would probably not have come up at all. In the case of a devise to several parties of several closes which completely surround one close as to which the testator dies intestate, the heir would claim a way of necessity to the highway. But

(g) 2 Lutw. 1487.

(h) 10 Ex. 824.

what is there to determine which of the closes is to become the servient tenement? The owners all took simultaneously by the same title. Whatever might be the result in such a case it is manifest that the doctrine of notice has no application to it. We may, therefore, discard that doctrine as not generally applicable to the question, and regard *Davis v. Sear* as a case *sui generis*.

The remaining cases depend either upon the opinions of the Judges who decided them, or upon the authorities cited, which are assumed to settle the question. *Pinnington v. Galland*, which is apparently disposed of upon other grounds, is open to very severe criticism from another point of view, besides containing an expression of Baron Martin's difficulty in accepting the doctrine. The learned Baron, in comparing a way by implied reservation with a way by implied grant, says, at p. 12 of the report, "There is no doubt apparently a greater difficulty in holding the right of way to exist in this case than in the other; but according to the same very great authority (i) the law is the same, for the note proceeds thus: 'So it is when he grants the land and reserves the close to himself'; and he cites several authorities which fully bear him out: *Clarke v. Cogge* (j), *Staple v. Heydon* (k), *Chichester v. Lethbridge* (l)." The quotation from the note does *not* express the individual opinion of the learned commentator, for he criticises very severely the doctrine which he states, besides pointing out that one of the cases, *Staple v. Heydon*, rather bears out a contrary view. To proceed with the quotation from Serjeant Williams' note. "This principle seems to be the foundation of that species of way which is usually called a way of necessity. It is so in a partial sense, because the way is a necessary incident to the grant. But it appears to be a term rather too comprehensive. For it is not at all improbable, that the *general* signification of this word it is, which has thrown some degree of confusion upon this sub-

(i) Serjeant Williams' note to *Pomfret v. Ricraft*, 1 Wms. Saund. 323 a.

(j) Cro. Jac. 170.

(k) 6 Mod. 1.

(l) Willes 72, 73.

ject, and been the occasion of an erroneous notion, which, for the want of attention sometimes prevails, that in *all* cases, whenever a man has a close surrounded by the land of another, he is therefore entitled to a way over the land for *necessity*. Thus in practice it is not an uncommon thing to plead a way of necessity in *general terms*, without specifying the manner whereby the land over which the way is claimed, became charged with the burden. So in 6 Mod. 3, *Staple v. Heydon*, it is said that if A. have a close surrounded by the land of another A. for *necessity* has a way over a convenient part of the land to his own close, as a necessary incident to his close. As if a self-created necessity could be, either in law or reason, any justification of a trespass committed on another's land. But not to mention that in the report of this case in 2 Ld. Raym. 923, there is nothing of the sort noticed, and on the contrary, Holt, C.J., expressly says that the defendant ought to have pleaded the way of necessity in a manner which precisely corresponds with the definition of it now attempted to be given, a little consideration will satisfy us of the error of opinion." This is a very different opinion from that of Baron Martin in *Pinnington v. Galland* which professes to be founded upon this note, and is not by any means correctly interpreted by that learned Judge, when he says that the cases in the note confirm the learned Serjeant's opinion.

Some of the cases cited by him certainly do set out the law as expressed, and the note merely states the effect of them, and then proceeds, as we have shown, to criticise their doctrine. It will also be found that in every case cited by the learned Serjeant the doctrine is expressed in an *obiter dictum*. In no case was it necessary to decide the point.

Thus in *Clarke v. Cogge*, it is said, "The one sells land, and afterwards the vendee by reason thereof claims a way over part of the plaintiff's land, there being no other convenient way adjoining, * * and it was resolved without argument that the way remained." And the report proceeds *et e converso*, and then states the doctrine of implied reservation, which was totally unnecessary and not in

question. *Staple v. Heydon* is disposed of in the note in Wms. Saunders. *Chichester v. Lethbridge* is not cited in the edition of 1845 ; but it does not decide anything either one way or the other. *Howten v. Frearson* (m), and *Jorden v. Atwood* (n) are also cited in the note ; but in the latter case the question was whether unity of seisin extinguished a way appendant. Everything else is *obiter dictum*. And the former case was one of implied grant and not of implied reservation. Serjeant Williams had therefore good grounds for his severe criticism of the doctrine for which these cases are cited.

Pinnington v. Galland, which professes to follow the very great authority of the learned Serjeant, and *Wheeldon v. Burrows*, the most authoritative case of all, which professes to follow *Pinnington v. Galland*, are thus bereft of a great deal of their weight. In the whole array of cases, therefore, there is not one that will bear criticism ; and, strange to say, the later authorities profess to rely upon the opinion of one who is himself a most able and severe critic of the doctrine expressed in the older, and reflected in the later, cases.

In addition to the note of Serjeant Williams, we have against this doctrine the direct authority of Lord Ellenborough in *Roberts v. Karr* (o).

In that case a man built his house in such a manner that he required to go across another's lands in order to get to the highway. His Lordship "was of opinion that if C.'s land had been sold by P. expressly for the purpose of building a house thereon, there would have been a way of necessity ; but it did not appear that such was the case ; and he therefore thought that there was no such way ; for clearly a man could not by his own act create a way of necessity."

With these authorities in our favour it is worth while examining whether or not upon principle such a right

(m) 8 T. R. 50.

(n) Owen 122.

(o) 1 Taunt. at p. 498.

arises by implication upon a simple grant of the lands surrounding a close.

It is a truism to say that that cannot be the subject of implied reservation or exception which is not the subject of express reservation or exception. If an express reservation or exception, *eo nomine*, of a way over land granted would be void, then such a way could not arise by implied reservation or exception.

An exception in a deed is that whereby the grantor excepts something out of that which he has before granted; by which means it does not pass by the grant, and is severed from the thing granted. And there are, amongst other things, the following essentials to a good exception, viz., the thing excepted must be part of the thing previously granted, and not of any other thing; it must be of such a thing as is severable from the thing granted, and not an inseparable interest or incident (*p*).

A reservation is defined by Coke. "*Reserve cometh of the Latin word *reservo*, that is to provide for store; as when a man departeth with his land, he reserveth or provideth for himself a rent for his own livelihood. And sometime it hath the force of *saving* or *excepting*. So as sometime it serveth to reserve a new thing, viz., as rent, and sometime to except part of the thing in *esse* that is granted*" (*q*). And the same authority says, "And note a diversity between an exception (which is ever of part of the thing in *esse*) for which *exceptis, salvo, præter*, and the like, are a few words; and a reservation which is alwaies of a thing not in *esse*, but newly created or reserved out of the land or tenement demised" (*r*). And in the Touchstone (*s*) it is said, a reservation "must be of some other thing issuing or coming out of the thing granted." So it is that if one of twenty acres is to be retained, the grant is made of twenty acres, except one. But a rent, the essence of which is that

(*p*) Touch. 77.

(*q*) Co. Litt. 143 a.

(*r*) Co. Litt. 47 a.

(*s*) P. 80.

it should issue out of the land, is reserved, the whole land being granted.

Now a right of way of necessity is not of such a nature as properly to form the subject either of an exception or a reservation.

It cannot form the subject of an exception, because it is not part of the thing granted, nor is it *in esse*, if at all, until the grant is complete, for the necessity does not arise until the grant has been made. It is not a thing severable from the thing granted; it is an interest or incident to the thing granted, is inseparable therefrom, and exists, if at all, only while the necessity for the way lasts.

Nor can it form the subject of a reservation, because it does not come out of the land. It is an easement; and an easement is a privilege without profit. A right to take stones from the land of another person to mend roads is a *profit à prendre*, and not an easement (*t*). So is a right to enter land and cut and carry away trees there growing (*u*). But a right to enter land and draw and take away water is an easement and not a *profit à prendre*, for water is *not a part or produce of the soil* nor the property of the owner of the land over which it flows unless confined in a tank (*v*).

These cases (and many more might be cited) show clearly the distinction between a profit issuing out of the soil and an easement, the former of which is properly the subject of a reservation, while the latter clearly is not.

In addition to this it appears that other rights may exist, which in like manner, can neither be excepted or reserved; for a privilege of hunting, hawking, fishing, and fowling, has been held not to be the subject either of a reservation or an exception in point of law; it is a privilege or right to be *granted* and not reserved or excepted; and so is distinguished from rent, etc., (*w*).

(*t*) *Constable v. Nicholson*, 14 C. B. N. S. 250.

(*u*) *Bailey v. Stevens*, 12 C. B. N. S. 91.

(*v*) *Race v. Ward*, 4 E. & B. 702.

(*w*) *Doe dem. Douglas v. Lock*, 2 Ad. & E. 705; and see *Wickham v. Hawkey*, 7 M. & W. 63.

If then a way of necessity cannot, upon principle, form the subject of a reservation or an exception, it would be improper to grant the land surrounding a close, and except from the grant by express words a right of way over it. Nor would it be proper to attempt the same thing by way of reservation. In such a case the attempted reservation or exception would, strictly speaking, be inoperative. *A fortiori*, a reservation or exception cannot be implied of that which does not form the subject of a reservation or exception.

When we recall the words of Serjeant Williams, that a way of necessity derives its origin from a grant, that there is no difference when a thing is granted by express words, and when by operation of law it passes as incident to the grant (*x*); when we recall the decision in *Proctor v. Hodgson* (*y*) where the way to the escheated landlocked parcel was denied because a grant could not be implied; and the decision in *Doe dem. Douglas v. Lock*; and when we recall Serjeant Williams' caustic remark that a self created necessity does not justify a trespass; and Lord Ellenborough's similar remark, in *Roberts v. Karr*, that a man could not by his own act create a way of necessity; it is abundantly clear that a way of necessity is the subject of a grant only, that it arises from the supposed intention of the grantor that his grant shall have its full and beneficial operation, that it is dependent upon the rule that a grant is taken most strongly against the grantor (*z*), that where a grant cannot be implied the way cannot exist. The doctrine of implied reservation answers none of these requisites. No intention can be imputed to the servient owner to ensure to the dominant owner the full enjoyment of his land; for the grantor is taking nothing from him, and it is in the power of the grantor to protect himself, while in the case of implied grant the grantee cannot do so. If the grant be taken most strongly against the grantor, that construction would deprive him of his way. Lastly, when there is no re-grant

(*x*) 1 Wms. Saund. 323 a, note (c).

(*y*) 10 Ex. 824.

(*z*) *Howten v. Frearson*, 8 T. R. at p. 56.

in the deed, a grant cannot be implied, and therefore a way, the subject or incident of a grant, cannot be implied.

Upon principle then and upon some of the authorities, there should be a separate grant, from the grantee of the land back to the grantor, of a way over the land granted. If, however, the deed should contain a *de facto* exception or reservation of the right of way, and were executed by the grantee, no doubt the reservation would be construed as a re-grant (a). In the case of a *de facto* reservation in the deed, perhaps it would not be necessary to go so far as to say that the grantee should execute the deed, for by accepting the benefits under it he would be held to the burdens. But when the deed contains no mention of the way, execution by the grantee, if not actually necessary, would be prudently required (b).

The difficulty of the position which we criticise is made even more apparent when the old but excellent test of pleading the right is applied. To recur again to Wms. Saunders (c). "It must be stated, that the same person was seised in fee of both closes *simul et semel*, and being so seised, he granted one of them." And the note in the 6th Edition upon this note is as follows:—"There is some difficulty in applying the doctrines above stated to the instance of a way of necessity, where a man having a close surrounded with his own land, grants the surrounding land, keeping the close, and the *grantee* does not execute the conveyance; for, in such a case, there cannot possibly be an implied grant of the way from him; nor can there, according to modern authorities, be any implied exception or reservation of it by the grantor; for it has been laid down that a right of way cannot be made the subject either of the one or the other, inasmuch as it is neither parcel of the thing granted, nor is it issuing out of the thing granted, the former being essential to an exception, and the latter to a reservation; and thus a right of way *reserved* (using that

(a) *Wilson v. Gilmer*, 46 U. C. R. 545; 2 C. L. T. 143.

(b) *Pitman v. Woodbury*, 3 Ex. 4; *Sweatman v. Ambler*, 8 Ex. 72.

(c) 1 Wms. Saund. 323 b. 323 c.

word in a somewhat popular sense) to a grantor or lessor, is, in strictness of law, an easement newly created by way grant from the grantee or lessee, in the same manner as a right of sporting or fishing. * * In a case, therefore, where the deed of grant is not executed by the grantee, it should seem that the way can exist only as an incident given by the law." And Sir George Jessel, M.R., in *City of London v. Riggs* (supra), without hinting at the difficulty in the way (which perhaps would not exist under our present system of pleading) points out that where the close is reserved it must be pleaded as a re-grant.

And so the authorities stand, built up one upon another, all resting upon the foundation of *obiter dicta*.

Considering the revolutions in the law of Easements worked by some notable cases, and the great difference of opinion that has existed from time to time amongst the most able Judges, it is not improbable that the subject of this paper may again be brought up for argument, and perhaps a reason will be found either for or against the authoritative doctrine.

CODIFICATION OF THE LAW.

We are moved to make some remarks upon this subject by the appearance of two pamphlets (a), by a member of the Bar of New York, where a proposed code has attracted serious attention for a number of years.

There are two questions discussed; first, whether it is practicable and advisable to attempt to formulate and enact as a code the whole body of the civil law; and, secondly, whether a certain draft code prepared some seventeen years ago by commissioners, of whom the most prominent is Mr. David Dudley Field, should be the one adopted. Any reader of the legal periodicals, or even the daily newspapers, of that State for the past year or two cannot fail to have noticed how warm this discussion has of late become. That the interest excited in it is confined almost exclusively to the legal profession, is due probably to the fact that other citizens feel themselves, from lack of knowledge of a subject matter so technical, practically at a loss to arrive at any conclusion upon the question, involved. The result is of concern to every individual, however little he may now realize it. Although the subject, as a whole, is one of local importance merely, yet its discussion has been fruitful of interesting and valuable suggestions concerning codification of the law, which may at some future time be found worthy of attention in Ontario. It is perhaps worth while, therefore, to note its origin and present status.

The law of the State of New York is cognate with that of this Province. The Common Law of England, as it existed

(a) *Das Englische Recht und Das Römische Recht als erzeugnisse Indo-Germanischen Völker*, Vortrag, gehalten Vor dem Deutschen Gessellig—Wissenschaftlichen Vereine Von, New York, Am. 15 Februar, 1882, Von J. BLEECKER MILLER. New York: E. Steign & Co., 1882.

Destruction of our Natural Law by Codification, by J. BLEECKER MILLER, of the New York Bar. New York: printed by H. Cherouny, 1882.

in 1775, remains in force save only as altered by subsequent enactments. By an amendment, passed in 1846, to the constitution of the State, the whole body of the law of the State, or so much of it as should seem practicable or expedient, was directed to be reduced to a written and systematic code. Commissioners were appointed in 1847, and again in 1857, and finally the result of their labours was published in 1865, and is embodied in the proposed civil code in question. This is in the form of an Act of the Legislature, composed of over 2,000 sections. It purports to embrace, among other things, both the written and the unwritten laws of the State (with certain alterations) concerning husband and wife, marriage and divorce, parent and child, guardian and ward, master and servant, real and personal property, uses and trusts, shipping, corporations, wills, contracts, sales, gifts, bailments, agency, carriers, trustees, partnership, insurance, principal and agent, principal and surety, lien, mortgage, stoppage in transitu, negotiable instruments, damages, specific performance and nuisance, all comprising "the law of civil rights and obligations affecting all the transactions of men with each other in their private relations." This code is said to be one of five proposed codes, the other four being the Political and Penal Codes, and the Codes of Civil and Criminal Procedure. It is proposed to enact that "there is no common law in any case where the law is declared by the five codes," and to abrogate all laws inconsistent with their provisions.

Assuming the extracts of various sections of this code, set out in pamphlets recently published by the Bar Association of the City of New York in connection with this discussion, to be accurately made, there appears not a little to excuse, if not to justify, Mr. Miller in his denunciations of the code, intemperate as, in some passages, these might otherwise appear. It is true that his criticisms lose a great part of their value, coming as they do from one who can see no good thing in the code; but, on the other hand, there is just as little value in the advocacy of those who can see nothing but perfection in it. It is alleged to be open to grave objections in many parts, and to stand in great

need of careful revision before being again submitted to the Legislature. It is stated to be confessedly inaccurate in certain of its provisions, taken as an exposition of the present law of the State, and is said to enunciate new principles totally foreign to that law, and of most doubtful expediency. It need not be criticised here. The fact that this code, with all its alleged shortcomings, has twice missed becoming the law of the State, abolishing and supplanting the present law, only through its failure to secure the Governor's assent, is charged as a reflection upon the ability of the State Legislature, which has been stigmatized (by an enemy of the code), as one of those "whose sessions are viewed with apprehension, and their adjournments with a feeling of relief."

Upon the general subject of codification, some of the arguments of those who advocate this measure will be readily assented to. Our law is undoubtedly in a somewhat confused condition. It rests, as has been said, partly upon tradition; but, for the greater part, it is to be found scattered through thousands of volumes, most of them practically inaccessible to the majority of men. There are already some 40,000 volumes of English and American reports, and each year is estimated to add some 10,000 or more to the number. Statutes, too, some of them effecting most radical and far-reaching changes in entire branches of law, increase the annual accumulation. But it is not only with a system which renders necessary constant reference to this enormous bulk of reports and statutes, as productive of unnecessary labour, that fault is found. It is urged that where a multitude of decisions, statutes and dicta, the production of different periods and of different minds, have necessarily to be collated, examined and given effect to, uncertainty and perplexity are certain in many cases to be begotten; and sometimes to so great a degree as to render impossible the attainment of any useful or trustworthy knowledge. To a layman it must be, and no doubt often is, a matter of surprise to find experienced lawyers at times obliged to confess that upon questions arising in certain branches of law, such for instance as those of Married Women's Property and

Contracts, Partnership, Suretyship, etc., they are unable to comprehend the collective intendment of statutes, or to reconcile a mass of apparently conflicting decisions. If the State imposes upon the subject the duty of making himself acquainted with the laws, and holds him accountable for his ignorance, the subject has, it is claimed, a right to demand of the State that these laws should be as few in number, clearly defined and accessible as they can be made.

Admitting these considerations to be true, it may appear that, after all, they do not touch the main point, namely, whether codification of the law will remedy all or many of these evils, and whether a satisfactory codification is, at this day, whatever it may become in the future, even possible. The negative of both propositions is supported by the authority of great names. Many celebrated American lawyers—Story, Kent, Greenleaf, Cushing, Evarts, and others—were and are of this opinion.

As Mr. Miller and other writers have pointed out, the law is a vast and necessarily abstruse science, abounding in refinements ; and attempts comprehensively to codify it may be said to have hitherto proved failures. Despite the opinion of theorists, the great body of the law must of necessity, from the unavoidable intricacy of the subject, remain forever a sealed book to a large portion of the community. The hopes of these enthusiasts whose aim it is to make every man his own lawyer will never be realized until, at least, the world has made an unlooked for advance in popular education, and, perhaps, not even then. It does not affect the truth or value of the binomial theorem that it cannot be easily explained to one ignorant of the elements of the science of algebra. Codes do not necessarily simplify law : in Continental countries where codes are in force, people are not less dependent upon advocates, nor have they any fuller knowledge of law, so far as known, than in England and America. If well understood technical terms be used in the formation of a code, the general public are just as much at a loss to understand the law as they were before ; while if new and quasi-popular terms are em-

ployed, lawyers immediately begin to fall out about their meaning.

The brevity and so-called simplicity of codes may often be dearly bought by the sacrifice of lucidity; their sententious definitions and arbitrary employment of new terms are apt to result in a vagueness most perplexing.

There remains room for grave doubts, therefore, whether the benefits claimed for codification are not overbalanced by its well-recognized dangers. This refers, however, only to codification of the Common Law as an entirety. There are certain branches of the law, such as those of Evidence, Partnership, Bills and Notes, etc., which seem peculiarly adapted to codification; and codes of these branches have already, in England, been outlined, with considerable success, both by text writers and in statutory enactments.

The practice of the Courts may also be written down in the form of a code with good results, as witness the English Judicature Act, which is of that nature. It is probable that if the Common Law is ever codified the change will be accomplished thus gradually, and each piece of workmanship having been tested separately will be all the more fit to be a component part of one grand whole.

The subject is of too great extent to be properly treated, even in outline, within the limits of a review notice.

The historical information collected by Mr. Miller upon the origin and development of certain branches of the English and Roman law will be found entertaining and instructive.

W. SETON GORDON.

EDITORIAL REVIEW.

The Ontario Reports.

A correspondent writes us a letter, which will be found on another page, concerning the delays in issuing these reports. Since the receipt of his letter several numbers have been received, and 6 App. R. is completed by the issue of the Digest number. The delay in completing both this volume and Mr. Grant's Chancery Reports was to a great extent, no doubt, due to the changes made in the Reporterships of the respective Courts during the currency of the volumes.

The American Law Review.

The amalgamation of the former journal of this name with the *Southern Law Review* has produced one which bids fair to combine the excellencies of both. The composition of the editorial staff, consisting of Mr. Eaton, lately editor of the *Southern Law Review*, and Judge Seymour D. Thompson, who is connected with the *Western Jurist*, is a guarantee of the standard which will be maintained in the conduct of the consolidated *Review*.

The Court of Appeal.

From the terms of the Act passed in the last session of the Ontario Legislature, respecting the better administration of justice, whereby the numerical strength of the Court of Appeal is to be increased to five, it is difficult to say whether the measure was intended for the relief of that Court or of the Chancery Division.

The Late Judge Mackenzie.

Those who knew the late Judge Mackenzie heard of his death with great regret. He had been a conspicuous man in the Profession for many years. Though not an able Judge, his relations with the Bar were always amicable, and there were few who did not respect him for his personal qualities.

NOTES OF RECENT DECISIONS.

In re Wilson v. McGuire, postea p. 161. There is in this judgment a confirmation of our opinions respecting the jurisdiction of a County Court Judge and a Division Court Judge respectively, when acting without their own county, *ante* pp. 20 and 81. As to the power of the Division Court Judges, there is the judgment of the majority of the Court that the Division Courts are within the legislative jurisdiction of the Provincial Legislature, which has the power to assign Judges to them. The dissenting judgment is founded to some extent upon the assumed fact that that Legislature has never appointed Judges to the Division Courts, and that what was done, was therefore done by a County Court Judge *ex officio*. This appears to us erroneous on the authorities. It is no part of a County Court Judge's duty as a County Court Judge to transact Division Court business, any more than it is to transact Superior Court business. He does it under some authority or commission. That authority or commission is R. S. O. cap. 47, sec. 19, which enacts that, "The Division Court shall be presided over by the County Court Judges, or Junior, or Deputy Judges, in their respective counties." Under this statutory commission every County Court Judge holds the Division Court in his own county, not as a County Court Judge *ex officio*, but as the person or official adopted and appointed by the Provincial Legislature on account of his credentials as a County Court Judge. The case is exactly parallel with that of the Dominion Election Courts. By *The Dominion Controverted Elections Act*, 1874, sec. 3, "The Court" is to mean the Courts mentioned in that section or any Judges thereof. Then follow the names of all the Courts in Quebec, amongst others. In *Valin v. Langlois*, 3 S. C. R. 1, exception was taken to the juris-

diction of the Superior Court of Quebec, because if a new Court was created by the Act no Judges had been commissioned and sworn. The learned Chief-Justice, as to that, says, at p. 34, "In my humble opinion, there is no force in this objection. The Judges require no new appointment from the Crown, they are statutory Judges in Controverted Election matters by virtue of an express enactment by competent legislative authority. The statute makes the Judges for the time being of the Provincial Courts Judges of these peculiar and Special Courts. The Crown has assented to that statute, therefore they are Judges by virtue of the law of the Dominion, and with the Royal sanction and approval. As to their not being sworn, the statute has not provided they should be sworn. If, being sworn Judges already, the Legislature was willing to entrust them with the power conferred by this Act, without requiring them to be sworn anew, how does this invalidate the Act, and how can the Judges refuse to discharge the duties thereby by law imposed on them, because, it may be, the Parliament might, or ought to have gone further and required the Judges to be specially sworn faithfully to discharge their special duties?" And again, at p. 31, "The Judges cannot sit in Controverted Election matters under the general jurisdiction of their respective Courts, for those Courts have no jurisdiction in such cases, and therefore, in discharging the duties imposed by this Act, they do not, and cannot do so as Judges of the respective Courts to which they belong, but they act as Election Judges appointed by and under the Act, outside of and distinct from the jurisdiction they exercise in their respective Provincial Courts, which is left untouched by this Act." These words are peculiarly apposite to the case in question and seem to be sufficient authority for the holding that the Division Court Judges are *de facto* Judges of those Courts acting under a statutory commission. The only question to be determined then is whether the legislative authority was competent. If section 96 had not appeared in the B. N. A. Act, it might have been an arguable question whether the prerogative of the Crown had been so curtailed by number 14 of section 92.

that the Provincial Legislatures would have had the power under that clause to appoint Judges as a necessary adjunct to their power of administering justice in the Provinces. But the enactment of the matter contained in section 96 points to the opinion of the Imperial Parliament that the power would have resided elsewhere but for that section. It declares that the Governor-General shall appoint the Judges of the Superior District and County Courts in each Province, *except those of the Courts of Probate in Nova Scotia and New Brunswick*. Who is to appoint the latter Judges? Not the Governor-General certainly. It could hardly be contended that they are to be appointed under the Royal Sign Manual. All sources are closed, therefore, except the Local Legislatures. And how else are Judges to be appointed to all Courts other than those mentioned in section 96?

Livingstone v. Bethune, ante p. 47. A few remarks may be fitly made in explanation of this case. B. had made entry for a homestead right of one half the lands in question, and for the right of pre-emption of the other half. He had not obtained a "recommendation" for the issue of his patent when he agreed to sell the land to L., or when L. filed his bill for specific performance. The day after the filing of the bill, B. obtained "leave to purchase" his homestead and pre-emption lands under sec. 34, sub-sec. 15 of the Dominion Lands Act, and then conveyed to S., an innocent purchaser; whereupon the bill was amended by adding a prayer for damages in lieu of specific performance. For the defendant it was objected that the contract was void as being an assignment of a homestead right within sub-sec. 17 of sec. 34 of the Dominion Lands Act; and, further, that the plaintiff could not recover damages on the Equity side of the Court, but must sue for them at law. On the other hand it was said that this was not an assignment or transfer of the homestead right; it was an agreement remaining *in fieri* to sell and convey the land. The case was that of a vendor

agreeing to sell land which he does not own, and afterwards acquiring the estate. When the bill was filed the defendant had not the estate, but he could not be heard to say so at any stage of the suit before the report on the title ; and he did acquire an estate which he could convey soon after the filing of the bill. The Court, then, had jurisdiction to decree specific performance, and might give damages in lieu thereof.

The holding of the Court upon the construction of the agreement was that it was not an assignment or transfer of a homestead right within the meaning of the sub-section quoted, but was, as a matter of fact, an agreement to sell the lands when acquired, and, as stated in the note (*ante*), that such an agreement might validly be made.

The Court also held that it had jurisdiction to give damages under Lord Cairns' Act, the defendant having fraudulently conveyed away the lands, and the Court having at one time pending the suit had jurisdiction to decree specific performance, and also following *Boulton v. Shore*, 2 C. L. T. p. 430, that damages might have been given independently of Lord Cairns' Act.

F. B. R.

BOOK REVIEWS.

Law and Lawyers in Literature, by IRVING BROWNE, author of "Humourous Phases of the Law," "Short Studies of Great Lawyers." Boston: Soule & Bugbee, 1883.

Mr. Browne's book is a confection of the law, and as a confection it must be taken—a little at a time. Not that it is abstruse or tiresome. On the contrary, it is refreshing, and does not tax the attention too severely. But no one would think of sitting down to con the book over from cover to cover. Perhaps the versatile author will be more than satisfied if he finds us picking it up a little oftener than occasionally, in order that we may see ourselves as others see us. The dramatists, the novelists, the moralists, the poets, all contribute their share; and epigrams, songs, odes, and burlesques, go to make the volume complete. Altogether we are convinced, from the many little attentions that great, small, and indifferent writers have bestowed upon us (to say nothing of our clients), that we are a very interesting profession.

BOOKS RECEIVED.

Principles of the Common Law. An elementary work intended for the use of Students and the Profession, by JOHN INDERMAUR, Solicitor, author of "Manual of Practice," "Epitomes of Leading Cases," "A Concise Treatise on Bills of Sale," etc. Third edition. London: Stevens & Haynes, 1883.

CORRESPONDENCE.

The Ontario Law Reports.

To the Editor of the Canadian Law Times :

SIR,—I desire to call the attention of your Journal, and through it the *proper* authorities, to the following dates with reference to our reports :

Chancery.—The current unfinished volume (29) was commenced in 1881—some time in May I believe,—two parts bear the impress of that year. A third part was issued in 1882, none since. No one will affirm that the reporter has been over-diligent in his work ; but the profession suffer.

Common Pleas.—The current unfinished volume (32) was commenced in Easter Term, 1881. One part was issued during that year. Three parts were issued in 1882, bringing the reports up to Easter sittings of that year. Volume still unfinished !

Ontario Reports.—Four parts issued in 1882. Volume still incomplete.

Appeal Reports.—Volume 6, commenced in 1881, in that year five parts issued ; in 1882 two parts. The volume still incomplete ! Waiting for the index and table of cases, I presume. Volume 7, commenced in 1882, and two parts issued. Why is the completion of volume 6 so long delayed ?

Practice Reports.—No number issued since October, 1882.

The foregoing facts fully illustrate the practical utility of your Journal. Its regular issue of condensed reports of the cases decided in all the Courts, ordinarily enables the pro-

fession to acquire some knowledge of what is going on in the way of *recent* decisions.

The reporting staff of the society evidently requires a little stirring up. There is no grievance of which the members of the Bar can so unanimously and justly complain, as delay in issuing the reports of the decisions of the various courts; and promptitude in their issue is one, at least, of the effectual means of ensuring the due administration of justice. If the reports are greatly in arrear it not only hinders the advocate but prejudices the suitor.

Your obedient servant,

A BARRISTER.

February 12, 1883.

REVIEW OF EXCHANGES.

Central Law Journal.—13th October, 1882.

Habeas Corpus—Custody of Infants, by GIDEON D. BANTZ. The writ is granted on the application of parent, guardian, or master ; its object, to remove unlawful restraint, not to enforce a right of custody. Instances of the exercise of the authority to issue the writ are given in English and American cases.

Ibid.—20th October, 1882.

Partnership—Implied power to bind the Firm by negotiable paper, by WM. L. MURFREE, JR. "The power of one member of a firm to bind his co-partners by contract, which is implied from the relationship, is limited by what is usually termed the 'legitimate scope' of the partnership business." For this purpose partnerships are divided into trading and non-trading partnerships ; a manufacturing firm is not a trading partnership, but a note given for supplies for the business will bind the firm. Farming and mining firms are not bound by notes even for supplies.

Ibid.—27th October, 1882.

Notice to Quit, by HENRY WADE ROGERS. The cases on some American statutes are referred to. Where a servant occupies a tenement on the premises of his employer, and is discharged, it seems, in England, that he is not entitled to be treated as a tenant. The American rule is the same. In Indiana, a Roman Catholic priest, subject to removal at the will of his bishop, was held not entitled to notice to quit the parsonage upon removal from charge. Vendee in possession pending contract is not entitled to notice to quit. A notice to quit should state the day on which the tenancy is to terminate.

Misrepresentation as affected by Intent, by I. N. PAYNE. In England, it is held that the general rule of law is, that fraud must concur with the false statement in order to give a ground of action. There is a conflict of authority in the U. S. A., the balance being in favour of the action whether the defendant knew or did not know the falsity of the facts.

Ibid.—3rd November, 1882.

Excuses for non-performances of Contract, by J. L. HIGH. Where a party prevents a thing being done he cannot avail himself of the non-performance he has occasioned. Sickness or death will excuse non-

performance of a contract of a personal nature. Acts of third parties, accidents, and the act of God do not excuse non-performance.

Ibid.—10th November, 1882.

Will sollopping Orders constitute a person a Hawker and Peddler under the various State Statutes? by JOHN F. KELLY. "The Court have adhered to the definition of a hawker and peddler given and known at the time when there was no other known method of peddling or hawking or selling goods from place to place but that of carrying along the goods when offering them for sale."

Ibid.—17th November, 1882.

The Foreclosure of Pledges, by F. R. MECHEM. I. In the case of the ordinary pledge, where no express provision has been made by the parties in regard to the method of foreclosure, it is held: 1. The pledgee may file his bill in equity against the pledgor, and have a decree for foreclosure and sale; or, 2, he may sell without judicial process by demanding payment of the debt, and giving the pledgor reasonable previous notice of the time and place of the sale; or, 3, if the pledgor is absent, or cannot be found, the pledgee must proceed by a judicial sale by bill and decree in equity. II. In cases where the parties have agreed upon the mode of foreclosure, the pledgee must follow that method when it is imperative; or, 2, he may follow it, or pursue either of the above modes, when it is optional.

Equitable Consideration, by W. F. ELLIOTT. "An equitable consideration will support a promise, but a mere moral obligation will not." Cases of revival of liability by express promises are instanced.

Ibid.—24th November, 1882.

Tender of Mortgage Debt After day of Payment, by M. W. HOPKINS. It being the law in many of the United States that a mortgage does not convey any title or estate in land, but creates a lien only, payment after the day of mortgage removes the lien just as it would if made at the day.

Law Journal.—12th August, 1882.

The Extent of Duty in Torts. A case of *Heaven v. Pender* reported in the August number of the *Law Journal Reports* is discussed. A painter whose master had contracted to paint a ship sued one who had contracted with the ship-owner to put a staging round the ship, in order that the painter might get at his work, for an injury caused by the giving way of the stage. Judgment for the plaintiff in the County Court was set aside.

Ibid.—19th August, 1882.

The Conveyance of Rights of Entry. A case of *Jenkins v. Jones* reported in the August number of the *Law Journal Reports* is discussed. "The important result of the decision is that a right of entry may be con-

veyed by a vendor out of possession, which holds good if the title be sound, and that a covenant for title by a man having a fair claim to real estate may be made the subject of an action for damages, if it turns out that there was a flaw in the title."

Evidence of Reputation in Libel. "The net result of the case of *Scott v. Sampson*, reported in the July number of the *Law Journal Reports*, may be stated to be that general evidence of bad reputation may be given against the plaintiff in an action of libel upon an allegation raising that issue in the defendant's pleadings; but instances tending to depreciate the plaintiff's reputation cannot be given."

Ibid.—2nd September, 1882.

Processions in the Street. A case of *Beatty v. Gillbanks*, reported in the August number of the *Law Journal Reports*, is discussed, in which it was held that a procession in the street is a lawful proceeding, and that those who take part in it cannot be bound over to keep the peace, notwithstanding that the procession may reasonably be expected to raise a tumult.

Ibid.—23rd September, 1882.

A case of *Keal v. Smith* is discussed. Smith's solicitor's clerk told the sheriff that L. had an interest in a brewery, and that he had better seize there under a *fi. fa.* A seizure followed. Keal claimed the goods, and succeeded on an interpleader issue. Keal then sued Smith, and judgment went for the defendant. "This case, illustrating again the judicial difference on the subject, has no great bearing on the present question, except that it emphasises the duty of the sheriff to see for himself that he is executing the writ regularly, and not to throw his own responsibility upon others."

Western Jurist.—October, 1882.

Inviolability of Corporate Charters, by W. P. WADE. The subject is treated upon the foundation of the prohibition contained in the several constitutions of the U. S. A. against impairing the obligations of contracts—a charter being considered as a contract between the State and the corporate body.

Ibid.—November, 1882.

Maintenance, by S. D. T. The subjects of champerty and maintenance are treated under the following heads:—The various forms of maintenance; and the exceptions to the rules against maintenance.

Ibid.—December, 1882.

Formal Requisites of Corporate Action, by EDWIN G. MERRIAM. The subject is divided as follows:—What is a Seal; Proof of Seal; Authority to affix Seal; Corporate Deeds—form and execution of; Relaxation in use of Seal; Ratification of Contracts informally executed; How far Statutory Formalities must be observed; Appointment of Agents need not be under Seal; Corporate Acts may be shown by Oral Evidence; Construction of Contracts by Corporate Agents.

THE
CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B.]

[6TH FEBRUARY, 1883.]

CRATHERN v. BELL.

Guarantee—Payment before default.

The judgment of the Court below, 46 U. C. R. 365; 2 C. L. T. 34, was affirmed on appeal.

Bethune, Q.C., for the appellant.

Delamere, for the respondent.

C. P.]

DEVANNY v. BROWNLEE.

Promissory note—Accommodation maker—Principal and surety—Renewal—Discharge of surety.

A married woman signed a note in blank and gave it to her son "to be used as he liked." He filled it up for \$1,200, signed it and transferred it to the plaintiff, who was not made aware of the circumstances under which it had been signed. It was renewed twice without the married woman's name, the original note remaining in the plaintiff's hands.

Held, that the married woman was a surety in respect of the note for her son, and that the authority to the son as to using the note did not extend to keeping it afloat after maturity without her knowledge, and that she had been discharged by the extension of the time for payment; reversing the decision of the Court below.

McClive, for the appellant.

Bethune, Q.C., for the respondent.

BADENACH v. SLATER.

Fraudulent preference—Trust deed for benefit of creditors.

By an assignment for benefit of creditors of all the assignor's real and personal estate the trusts thereof were declared to be (1) for the payment of expenses, (2) to retain a reasonable compensation, based upon the care and trouble bestowed in and about the trusts, (3) after a just and equitable distribution of the expenses as between partnership and separate estates, "to pay and divide the residue of the partnership estate and the surplus of the separate estates unto and among all and every the creditors of the said partnership, according to the amount of their respective claims ratably and proportionally; and the respective separate estates (less their proportion of the said costs, charges, expenses, and allowances); and any surplus of the partnership estate, unto and among the separate creditors respectively" and provided that the assignee "shall only be answerable or chargeable for wilful neglect or default."

Held, affirming the judgment of the Court below, that the deed could not be impeached as a fraudulent preference of creditors within the Act, R. S. O. cap. 118.

Gibbons, for the appellant.

Foster, for the respondent.

HEDSTROM v. THE TORONTO CAR WHEEL CO.

Contract to deliver iron—Action for non-acceptance.

The judgment of the Court below, 31 C. P. 475; 1 C. L. T. 123, affirmed.

Bigelow, for the appellant.

G. Kerr and Akers, for the respondents.

QUINLAN v. THE UNION FIRE INSURANCE CO.

Fire Insurance—Statutory conditions—Diagram by agent of Company from previous inspection and knowledge—Estoppel.

Held, reversing the judgment of the Court below, 31 C. P. 618; 1 C. L. T. 211, upon the facts there stated that the defendants could not set up as

a defence the omission to make known the presence of the buildings within one hundred feet.

Bethune, Q.C., and Dixon, for the appellant.

McCarthy, Q.C., and A. C. Galt, for the respondents.

McMASTER v. GARLAND.

Equitable assignment of proceeds of sale of goods—Chattel Mortgage Act.

The judgment of the Court below, 31 C. P. 320; 1 C. L. T. 62 was affirmed, Armour, J. dissenting.

Per Armour, J. Though the transactions (as set forth in above reports), had effected good equitable assignments of the *proceeds* of the goods when sold by S. S. & Co., the *legal* right thereto, subject to the liens on the sum to be realized by the sale, still remained in B., and therefore they were exigible under a *fi. fa.* against him in the hands of the sheriff, who would hold the moneys arising from the sale for the benefit of the execution creditors, after first paying off the orders given by B. on S. S. & Co.

McCarthy, Q.C., and W. H. P. Clement, for the appellant.

J. K. Kerr, Q.C., and Allan Cassels, for the respondent.

SPRAGGE, C.]

SMITH v. THE MERCHANTS' BANK.

Warehouse receipts—Warehouseman—Bank acquiring receipt.

By 34 Vict. cap. 5, sec. 46, a bank may acquire and hold any receipt by a keeper of a wharf, etc., for goods deposited on any wharf, etc., as collateral security for the payment of bills or notes discounted by the Bank for the holder or owner of such receipt, and such receipt shall vest in the Bank all the title of the last previous holder, etc.

Held, reversing the judgment of the Court below, 28 Gr. 629; 1 C. L. T. 387, that to bring a transaction within this section there must be three parties concerned, viz., the owner of the goods, a person filling the position of warehouseman or wharfinger, and the Bank, and it is from the holder of such receipt only that the Bank can acquire the document as collateral security.

Per Armour, J. The above section is *ultra vires*, the subject matter being within the jurisdiction of the Provincial Legislature under number 13 of sec. 92 B. N. A. Act.

MacLennan, Q.C., and Kingsford, for the appellant.

Robinson, Q.C., and J. F. Smith, for the respondent.

BLAKE, V.C.]

STAMMERS v. O'DONOHUE.

Specific performance—Sufficient signing of contract.

The judgment of the Court below, 28 Gr. 207; 1 C. L. T. 128, was affirmed on appeal.

O'Donohue, Q.C., in person, appellant.

Bain, for the respondent.

PROUDFOOT, V. C.]

CANADA LANDED CREDIT CO. v. THOMPSON.

New trial—Conflict of evidence—Erroneous view of law.

Where there was a conflict of evidence, and the learned Judge who tried the case attributed greater weight to the evidence of some witnesses than to that of others, but in the opinion of this Court took an erroneous view of the law, this Court refused to make a decree upon the mere perusal of the evidence, but remitted the case to the Court below for a new trial.

McCarthy, Q.C., and *Creelman*, for the appellants.

W. Cassells, for the respondents.

GOODERHAM v. TORONTO & NIPISSING RAILWAY CO.

Railway Company—Working expenses and outgoings—Receiver—Debts due before appointment—Accounts.

A receiver of the defendants' railway had been appointed to take the revenues, issues, and profits, to pass his accounts periodically, and to pay into Court the balance due from him after providing for the working expenses and outgoings of the Railway. The Master was directed to take an account of all persons entitled to liens, charges, or encumbrances and to settle their priorities, and the money to be paid into Court was to be paid to such persons according to their priorities to be ascertained.

Held, affirming the decision of Proudfoot, V.C., that the Master, in taking the receiver's accounts, should have allowed debts paid for working expenses which were not regularly payable until after his appointment, but not those already in default at that time, which were properly payable out of the moneys to be paid into Court according to their priority.

C. C. WELLINGTON.]

[27TH DECEMBER, 1882.

CANADIAN BANK OF COMMERCE v. WOODWARD.

Accommodation note—Collateral security—Renewal of principal note.

Renewal of a note can in no sense be treated as payment.

The defendants made a note for the accommodation of M., to be used by him as a collateral security for the payment of a note made by himself. M. discounted his note with the plaintiffs, and delivered to them the defendant's note as collateral. He renewed his own note for part at maturity.

Held, that the defendants remained liable to the plaintiffs to the extent of the renewal notes.

J. K. Kerr, Q.C., for the appellant.

Johnson, for the respondents.

C. C. YORK.]

TOTTEN v BOWEN.

Husband and wife—Loan from wife to husband—Chattel Mortgage—Change of possession—Bill of sale—Pressure.

The plaintiff was married in 1876 without a marriage settlement. She was possessed of \$1,500, which she lent in various sums to her husband, who gave her a chattel mortgage for one loan of \$200 on his farm stock. Shortly afterwards for the expressed consideration of \$300, at her solicitation, he gave her a bill of sale on the same stock. The chattel mortgage was filed but never renewed. The farm stock remained in use on the farms on which they resided. In consideration of the abandonment of her claim under the chattel mortgage and barring her dower in some other lands, the husband conveyed his farm to her.

Semble, that the chattel mortgage, if renewed, might have been upheld as between husband and wife, for the husband might have been declared a trustee for the wife; but having expired, there was no evidence of change of possession to support the transaction, nor from the relationship of the parties could there have been, unless the goods had been removed from the farm on which they resided together; but,

Held, that the wife's claim under the bill of sale was valid, and was not within R. S. O. cap. 118, sec. 2, inasmuch as it had been made at her solicitation and was not the voluntary act of her husband.

Held, also, that it was not extinguished by the conveyance of the land to her, the expressed consideration for which was the release of claims under the chattel mortgage and her bar of dower.

DIVISION COURT, LEEDS AND GRENVILLE.]

[SPRAGGE, C.J.O., 6TH FEBRUARY, 1883.]

WILTSIE v. WARD.

Claim ascertained by signature—Division Courts Act, 1880.

By the Division Courts Act, 1880, the Division Courts have jurisdiction in actions for debt when the sum does not exceed \$200, and the amount or original amount is ascertained by the signature of the defendant. In this case the claim was upon the following document: "Received from R. W. an order for C. B., ordering me to pay him the sum of \$140, which is accepted on the following conditions, providing he carries out his agreement with me as cheesemaker. (Signed.) M. W."

Held, that the Division Court had no jurisdiction, because the writing did not ascertain the amount, inasmuch as that depended upon the happening of certain events with respect to which evidence had to be adduced.

George Macdonald, for the appellant.

Falconbridge, for the respondent.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 6TH FEBRUARY, 1883.]

BOOTH v. CUMMINGS.

Trespass to land—Highwater mark—Land covered with penned back water.

The plaintiff's predecessor in title purchased several lots bordering on a creek. He erected a mill dam on the creek and penned back the water so that it overflowed parts of lots 11 and 12, commonly called the Flats. He subsequently conveyed parts of lots 11 and 12 to the plaintiff, one of the boundaries being "The line of high water mark on the east side of Mill Creek." The mill dam having thereafter fallen into disuse, the water escaped, and the Flats which had been covered with water again appeared. The defendant entered upon the Flats and the plaintiff brought trespass, relying upon the description in his deed.

Held, that what was evidently intended by "the line of high water mark" was the highest point to which the water could be raised by penning it back by the then existing dam, for if the grantor in that deed had conveyed the land to the natural bank of the creek he would have deprived himself of the right to pen back the water on the Flats.

H. J. Scott, for the plaintiff.

W. H. P. Clement, for the defendant.

In re WILSON v. McGUIRE.

Constitutional law—Local Courts Act—County Court Districts—Validity of Act respecting—Jurisdiction of Division Court Judge without his own County—Prohibition.

Pursuant to the Local Courts Act, R. S. O. cap. 42, ss. 16, *et seq.*, the Counties of Middlesex and Lambton were proclaimed by the Lieutenant-Governor as a County Court District. By section 17, in such a District the several County Courts, Division Courts, etc., shall be held by the Judges in the District in rotation. By the Division Courts Act, R. S. O. cap. 47, sec. 19, the Division Courts shall be presided over by the County Court Judges in their respective counties. An order for the committal of the defendant was made by the Judge of the County Court of the County of Lambton sitting in a Division Court in the County of Middlesex under the provisions of the Local Courts Act. A motion for a prohibition was made on the ground that that enactment was *ultra vires*.

Held, Armour, J., dissenting, that the Provincial Legislature has complete jurisdiction over the Division Courts, including the appointment of officers to preside over them, that the learned Judge acted in the Middlesex Division Court as one of the persons designated by the Legislature to preside over it, and having regard to the enactment in question in its bearing on Division Courts it was not *ultra vires*.

Per Armour, J. Section 13 of the Local Courts Act is *ultra vires*. The Provincial Legislature, having no power to appoint County Court Judges, neither can authorize the Governor-General to appoint one by order as enacted (the appointment being properly made only by Letters Patent under the Great Seal), nor can it depute a County Court Judge to nominate another Judge to take his place as enacted. The clear and sole effect of section 17 is to appoint the Judge of each County Court in any District Judge of all the others, which is *ultra vires*.

The Provincial Legislature has no power to appoint the Judges of the Division Courts; but it has not yet assumed to do so, and in this case the Judge acted solely by virtue of being Judge of the County Court of the County of Lambton, and as such assigned to perform the duties of the Judge of the County Court of Middlesex, and was therefore acting without authority.

Belkune, Q.C., and *Bartram*, for the motion.

Irving, Q.C., contra.

MILLER v. HAMELIN AND WIFE.

Mortgagor and mortgagee—Statute of Limitations—Acknowledgment—Insolvent Act of 1864—Trustee and cestui que trust—Possession of husband and wife.

Held, reversing the judgment of Osler, J., 2 C. L. T. 493, upon the facts there stated, that the possession of H. and his wife must be considered to have been the possession of H., that neither the title of the first mortgagee, nor that of the assignee, who was in fact trustee for H. as well as for his creditors under the Statute, was extinguished, and therefore that the plaintiff was entitled to recover.

Bethune, Q.C., and O'Brian, for the plaintiff.

Beaty, Q.C., and A. Cassels, for the defendants.

EVANS v. WATT.

Seduction—Marriage with third person during pregnancy—Cause of action—Evidence, admissibility of.

When an unmarried woman is seduced and pregnancy follows, or sickness which weakens or renders her less able to work or serve, the father's cause of action is complete and cannot be divested by the subsequent marriage of his daughter before birth of a child.

The defendant had seduced the plaintiff's daughter, who was married to a third person during her consequent pregnancy, and a child was born four months after the marriage. The action was brought at the instigation of the husband, he and his wife being the only witnesses. No proof of sickness or inability to serve was given, and a nonsuit was entered.

Held, Armour, J., dissenting, that the nonsuit was right.

Per Hagarty, C.J. The facts of seduction, pregnancy, and illness might be proved by the daughter, but *semble* that she might refuse to answer as to who was the cause of her pregnancy, if she asserted that the child was born in wedlock.

Per Armour, J. The father's right of action rested upon the daughter's pregnancy, and was not divested by her subsequent marriage. The evidence of the daughter that the defendant was the father of the child, and that of the daughter and her husband, of non-access prior to marriage, were both admissible as a matter of necessity.

HEENAN v. HEENAN.

Boundary line—Erroneous line—Description of land—Equitable right to possession—Action for recovery thereof.

A testator who had purchased lots 21 and 22, divided them between two of his sons by running a line which he intended to be and believed was the true boundary between the lots. This line diverged from the true line at one point so as to cut off part of lot 21. He demised lot 22 for ten years to the defendant, and put him into possession thereof, and the defendant occupied, as part of the land demised, that portion of 21 cut off by the erroneous line. The testator by his will devised all his property to his executor, Thomas Heenan, upon trust that his son James should use, occupy, and enjoy lot 21 for life at a rental, and that the defendant should use, occupy, and enjoy lot 22 for life at a rental. After the testator's death, the plaintiff sued the defendant for arrears of rent, and the defendant took a new lease from the plaintiff of lot number 22 and surrendered the lease from his father of the same lands. James assigned all his interest in lot 21 to the plaintiff, who procured a survey to be made, when it was ascertained that part of the land in the defendant's possession formed part of lot 21 as cut off by the erroneous line, and the plaintiff brought this action to recover it.

Held, that he was entitled to recover it ; for as the line was intended to follow the true division line between lots 21 and 22, the devise and two demises of lot 22 were therefore intended to comprise the land within the actual boundaries of that lot only, and not the land erroneously supposed by the testator to form that lot.

James and the defendant had agreed verbally to occupy the land on each side of the line as it stood until the Township Council should lay out a road between them. The defendant forbade a tenant of part of lot 22, lying on James' side of the line, to pay rent to James.

Held, that by this agreement they became each tenants at will of that part of the other's lot which lay on his side of the line, and that the defendant's forbidding the tenant to pay rent determined the tenancies.

A plaintiff equitably entitled to the possession of land can, since the Judicature Act, maintain an action for the recovery thereof.

McCarthy, Q.C., for the plaintiff.

J. W. Kerr, for the defendant.

[12TH FEBRUARY, 1883.]

VOGEL v. THE GRAND TRUNK RAILWAY CO.

Railway Act, 1879, 42 Vict. cap. 9, sec. 25, sub-sec. 4 (D)—Carriage of live stock—Special contract—Owner's risk—Condition against loss by negligence.

The Railway Act of 1879, 42 Vict. cap. 9, sec. 25, sub-sec. 4 (D), which declares that the party aggrieved by any neglect or refusal in the premises, shall have an action therefor against the Company; from which action the Company shall not be relieved by any notice, condition, or declaration, if the damage has arisen from any negligence or omission of the Company, or of its servants, is applicable to the defendant Company, and the words "in the premises" mean the premises set out in the previous sub-sections.

The plaintiff shipped live stock on the defendants' railway, subject to the conditions on a bill of lading, one of which was that live stock is taken entirely at owner's risk of loss, injury or damage, etc., or in loading and unloading conveyances or otherwise. * * All live stock carried by special contract only. The animals were killed or lost by the defendants' negligence.

Held, that the defendants could not escape liability by their conditions, for they were expressly made liable by the above clause of the Railway Act.

Dickson, Q.C., for the plaintiff.

Bethune, Q.C., for the defendants.

AITCHESON v. MANN.

Action for infringement of patent—Place of trial.

The 35 Vict. cap. 26, sec. 24 (D), enacting that the place of trial in a patent case shall be at the place of sittings of the Court nearest to defendant's place of residence or business is not *ultra vires*.

This was an action for alleged infringement of a patent. The plaintiff named as the place of trial, Belleville, where he resided; the defendant lived and carried on business at Brockville. The Master in Chambers made an order changing the place of trial to Brockville pursuant to 35 Vict. cap. 26, sec. 24, which was affirmed by the Chancellor; 2 C. L. T. 554.

MacLennan, Q.C., now appealed from the decision of the Chancellor. The section of the Act in question enacts that an action may be brought for infringement of a patent in any Court of Record in the Province having jurisdiction to the amount of damages asked for, and being the one of which the place of holding is nearest the place of residence or of business

of the defendant. The question is in what Court the action should be brought, and not where the venue should be laid when the proper Court has been ascertained. The clause is permissive and not obligatory. The clause is *ultra vires* in so far as it assumes to regulate the place of trial, which is matter of procedure and falls within number 14 of section 92, B. N. A. Act; *Théberge v. Landry*, L. R. 2 App. Cas. 102; *Citizens' Ins. Co. v. Parsons*, L. R. 7 App. Cas. 95. Under Rule 254 the plaintiff can name any county town as his place of trial.

Hoyles, contra. Patents of invention and discovery are within the jurisdiction of the Federal Parliament, and therefore that body can both erect Courts and regulate procedure for the trial of such cases; *Cushing v. Dupuy*, L. R. 5 App. Cas. 409; *Valin v. Langlois*, 3 S. C. R. 1; *Goldsmith v. Walton*, 9 P. R. 10. The word "may" in the section is a remedial provision for the benefit of the defendant, and therefore is not permissive; *Maxwell on Statutes*, 224; *Roles v. Rosewell*, 5 T. R. 538; *Hardy v. Bern*, *Ibid.* 636.

PER CURIAM.—The section in question is not *ultra vires*; the word "may" is obligatory, and the venue should be laid at the place nearest the defendant's place of residence or business.

Appeal dismissed with costs.

REGINA *ex rel.* NASMITH v. CITY OF TORONTO.

Municipal By-law—Reasonableness—Regulating weight of bread.

By-law 1128 of the City of Toronto declares what the weight of loaves shall be, and enacts that the weight of every loaf sold or offered for sale shall be stamped thereon, and that all bread offered for sale of any less weight than the weight fixed by the by-law shall be seized and forfeited.

Held, that the by-law was *intra vires*, and not unreasonable.

Rose, Q.C., for the relator.

McWilliams, for the City of Toronto.

[OSLER, J., 29TH JANUARY, 1883.]

ROBERTSON v. KELLY.

Contract by lunatic—Validity of.

The plaintiff made certain necessary repairs upon the defendant's vessel. At the time the agreement for the repairs was made, the plaintiff knew that

the defendant was subject to insane delusions, believing that people were conspiring against him. He, however, superintended the repairs and talked rationally to the workmen, but subsequently he became violent and was confined in an asylum for the insane.

Held, that the plaintiff was entitled to recover for the work done.

Tilt, for the plaintiff.

McCarthy, Q.C., for the guardian of the defendant.

[ARMOUR, J., 1ST FEBRUARY, 1883.]

MACDONALD v. CROMBIE.

Interpleader -- Judgment on non-appearance -- Immediate execution -- Irregularity -- Preferential judgment -- Sheriff's sale -- Purchase by judgment creditor -- R. S. O. cap. 118.

An execution, issued on the same day that a judgment on default of appearance is signed, is an irregularity and not a nullity, both upon the authorities and by virtue of Rule 473, and can only be taken advantage of by a party to the action and not by a subsequent execution creditor.

M., who was in insolvent circumstances, stated an account with the defendant, in which were included some immatured acceptances which were then delivered up to him. By arrangement the defendants recovered judgment against M. on the account on default of appearance, and under an execution, issued on the same day, M.'s stock was sold by the Sheriff, the defendants becoming the purchasers. Their object, as expressed in a letter from their agent to themselves, was to get a preference, and by taking everything under the writ to let M. "go on and reduce his stock and see what the spring trade" would do. The plaintiff subsequently obtained judgment, under Rule 324, and issued execution.

Held, that the defendants' judgment and execution were merely a device to get a preferential transfer of the stock to themselves, and were void as against the plaintiffs, within the meaning of R. S. O. cap. 118, sec. 2, which prohibits a person in insolvent circumstances from making any gift, conveyance, assignment, or transfer of any of his goods, chattels or effects with intent to give one or more of his creditors a preference.

[GALT, J., FEBRUARY, 1883.]

REGINA v. THE CANADA CENTRAL RAILWAY CO.

Railway Company—Compensation for right of way—Limitation of actions—Mandamus.

At the trial on the return of a rule nisi for a mandamus to compel the defendants, pursuant to the Railway Act, 1868, sec. 9, s-s. 10, to take proceedings for compensating T., the applicant, for the right of way over certain land, it appeared that T. derived title from S., who, some years before, had agreed verbally to grant the right of way to the defendant company without compensation. No conveyance was executed, but the company went into possession and constructed their railway, and had been in continuous uninterrupted possession for more than ten years before this application.

Held, that T. could not succeed; for the above subsection provides for making compensation only to the owners of land, and the title of T., and S. through whom he claimed, had become extinguished by the Statute of Limitations and had become vested in the defendants.

Gormully, for the appellant.

McTavish, for the defendants.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 15TH FEBRUARY, 1883.]

KLEIN v. THE UNION LOAN CO. *et al.*

Mortgagor and mortgagee—Insurance by latter without application—Breach of condition—Circumstances material to risk—Neglect of mortgagee—Subrogation.

In addition to the facts stated, 2 C. L. T. 512, it appeared that no application was asked for or signed when the insurance in question was effected with the defendant Insurance Company; that the policy existing at the time of the mortgage contained endorsements assenting to prior insurances, that the policy in question herein was intended to take the place of the then existing policy, and that the latter was handed to the Insurance Company as the basis of the insurance about to be effected with them; that though there had been a change in the plaintiff's firm in working the mill, etc., the retiring partner was a party to, and still liable on, the mortgage to the Loan Company and entitled to redeem the mortgaged property, and the Court was of opinion on the evidence that the change was known to the officers of both the defendant companies; that there was an incumbrance

subsequent to the defendant Loan Company's not disclosed to the defendant Insurance Company.

Held, reversing the judgment of Ferguson, J., (i) that no misrepresentation having been made, and no questions having been asked as to K.'s interest, and it appearing that he had an insurable interest, he was entitled to join in the action to recover according to his interest; (ii) that the change was not as a matter of fact a circumstance material to the risk, and at any rate, as a fact, it was known to the Company; (iii) that the existence of the subsequent encumbrance was immaterial to the risk, which, in the first statutory condition, means the hazard incurred or the exposure to danger from the thing insured against, and the omission to disclose it was therefore not a breach of this condition; and the policy having issued without application, *semble* that information as to encumbrances was thereby waived, and that the Company intended to insure regardless of the title; (iv) that, as a matter of fact, it was not shown that the disclosure of the encumbrance would have affected the rate of premium; (v) that the Insurance Company having had in their possession the prior existing policy with endorsements as to prior insurances, and their policy being intended to take the place of the existing policy, it was their duty to have properly issued their policy agreeing to take the place of the existing policy, and it was also the duty of the Loan Company to have seen that the policy was duly issued and endorsed, and, upon a proper record, a reformation of the policy would have been made; (vi) it appearing that the Loan Company had represented to the mortgagors that the policy was a "renewal" of the old policy, and that it was indisputable on any grounds, the Loan Company was liable to make good their representations to the plaintiffs; (vii) that the Insurance Company could not take advantage of their own omission to endorse the assent to prior insurances on the policy, to claim the benefit of the subrogation clause; (viii) that the equitable right of the mortgagors who had paid the premiums could not be varied by an agreement between the mortgagees and the Insurance Company without the mortgagor's assent, and that the right of the mortgagors was not affected to contend that the mortgage was a chose in action which passed to the Insurance Company, subject to the equities between the mortgagors and mortgagees, amongst which was the equity that it had been satisfied in the hands of the latter by the receipt of moneys procured by means of premiums paid by the mortgagors; (ix) the fact that the Insurance Company had treated with the plaintiffs by requiring them to furnish proofs, etc., and finally offered them \$3,250 in full of all claims, was cogent evidence of the affirmance of the contract.

DOVEY v. IRWIN.

Judgment on admissions in pleadings.

Action for conversion of timber. Claim: that the plaintiff and J. D. agreed to sell to the defendants certain timber, but did not deliver any:

but having taken a large quantity to a certain place, the defendants carried it off; that J. D. was surety only; offer to accept price of timber; defendants pretend that they agreed with J. D.'s assignee in insolvency to get the timber at a reduced price, but if such an agreement was made it was without plaintiff's assent, and J. D.'s assignee had no power so to agree. Defence: admits joint agreement; denies suretyship of J. D.; that plaintiff and J. D. got out timber after agreement and measured and marked it with defendants' mark, and they advanced \$220 on it; that J. D. became insolvent, and plaintiff left the Province and refused to carry out the agreement, and did not repay the advances, and defendants took the timber; that they agreed with J. D.'s assignee for a reduction in price. Upon the admission in the defence, Ferguson, J., gave judgment to the plaintiff for a reference as to amount due.

Held, reversing the judgment, that the defence proceeded upon the theory of a joint contract, and that as the *onus* was upon the plaintiff to substantiate by evidence his allegation that J. D. was not interested in the contract, the admission was not sufficient to entitle the plaintiff to judgment without the production of such evidence.

The whole of an admission should be looked at, and the sense and not merely the grammatical construction or form thereof is to be regarded as the criterion of the extent and scope of the admission.

[PROUDFOOT, J., 20TH FEBRUARY, 1883.]

FLANDERS v. D'EVELYN.

Guardian and ward—Action for legacies to ward—Payment into Court—Costs.

In an action by the guardian appointed by the Probate Court of Minnesota, U. S. A., to infant children to recover legacies bequeathed to them, the Court refused to direct payment to him, as it did not appear that the money was required for the children, and as by the law of Minnesota, which appeared to be the same as our law, the guardian would have been directed to pay the money into Court; the money was accordingly ordered to be paid into Court.

The defendant being beneficially interested in the residue, no order was made as to his costs; and the plaintiff having failed was refused costs.

[FERGUSON, J., 5TH FEBRUARY, 1883.]

LUMSDEN v. SCOTT.

Trustee for creditors—Right to set aside fraudulent conveyance by debtor.

Held, upon demurrer to a statement of claim, that an assignee in trust for the benefit of creditors cannot maintain an action to set aside a fraudulent conveyance made by the debtor prior to the assignment.

Sheppard, for the demurrer.

Osler, Q.C., contra.

McGREGOR v. McGREGOR.

Improvements under mistake of title—Occupation rent, computation of.

M. had gone into possession of and improved land belonging to his mother on the promise of his father and mother to convey it to him. The making of the conveyance was postponed, and the mother died without having conveyed. M. then spoke to his father about a deed, saying that if he, the father, should die, he, M., would only get a child's share. The father then made a conveyance in fee simple to M., believing himself to be heir to his wife. M. remained in possession for some years and made improvements. The decree referred it to the Master in Ordinary to take an account of the rents and profits received by M., charge him with an occupation rent, and take an account of the amount by which the land had been improved by him under the belief that it was his own. The Master allowed M. for only such improvements as he had made after the conveyance from his father.

Held, on appeal from the Master, affirming his ruling, that upon M.'s own evidence he did not believe that the land was his own before the conveyance, but that he only expected to own it, and therefore the improvements made by him before the conveyance were properly disallowed.

In fixing an occupation rent the Master charged M. with a rental upon the value of land as enhanced by his improvements made both before and after the conveyance to him.

Held, reserving the Master's ruling that the occupation rent should have been fixed without reference to the enhanced value by reason of the improvements that had been disallowed.

TIDEY v. CRAIB.

Chattel mortgage—Expiry—Subsequent mortgages—Pressure—Affidavit of bona fides—Consideration.

On 8th May, 1879, C. and J. made a chattel mortgage to the plaintiff, which was fyled, but expired for want of renewal. J. having sold all his interests in the goods to C., the latter, on 19th September, 1879, made a

chattel mortgage for \$1,000 to P. C., who had notice of the plaintiff's mortgage. On 3rd September, 1880, C. executed a second mortgage for \$1,500 on the same chattels to P. C. and J. C., both of whom had notice of the prior mortgages. All of these mortgages were made for actual valuable consideration, and in good faith.

Held, that P. C. and J. C. were subsequent mortgagees in good faith for valuable consideration within the meaning of section 10 of the Chattel Mortgage Act, and therefore that the plaintiff's mortgage by not being renewed ceased to be valid as against them.

The mortgages to P. C. and J. C. were made at their solicitation, and were not the voluntary acts of the mortgagor.

Held, that they were not fraudulent preferences.

The affidavit of *bona fides* in the mortgage to P. C. and J. C. was made by J. C. only; and it appeared that the whole consideration was not accurately stated in the mortgage, it being partly made up of the mortgagees' liability on immature paper of the mortgagor.

Held, that the affidavit was sufficient, and that in the absence of fraud the erroneous statement of the consideration did not invalidate the mortgage.

Ball, Q.C., and *W. Cassels*, for the plaintiff.

Mess, Q.C., and *W. Nesbitt*, for the defendants.

IN CHAMBERS.

[PROUDFOOT, J., 13TH SEPTEMBER, 1882.]

RYAN v. FISH.

Dower—Admission of Seisin—Pleading.

The plaintiff, a dowress, by ordinary writ of summons claimed \$1,000 damages for detention of dower. The defendants appeared, acknowledged that they were tenants of the freehold, and consented to judgment for dower. The plaintiff then pleaded. Claim: setting out title, appearance, and acknowledgment, asking for damages and a reference to ascertain them. Defence: That a great part of the lands were in a state of nature, and that plaintiff was not entitled to \$1,000, but to a smaller sum, if any; 2. That plaintiff had assigned all her claim to her son, who was a necessary party as beneficial plaintiff. 3. Set off against the son. Issue. On a motion by the plaintiff the Master in Chambers struck out the 2nd and 3rd paragraphs of the defence, and referred it to the Master in Ordinary to assess the damages on the admission in the 1st paragraph thereof.

Held, reversing the Master's Order, that the admission in the 1st paragraph of the defence was not sufficient to entitle the plaintiff to a reference; that the acknowledgment of seisin of itself did not imply any right to

damages, for the defendants might have been always ready to assign the dower; that the 2nd and 3rd paragraphs of the defence were not embarrassing but good defences if true, and raised issues of fact which had been accepted and should not have been struck out.

[CAMERON, J., 13th FEBRUARY, 1883.]

SCHWOB v. McLAUGHLIN.

Costs of the day.

By an order of the Master in Chambers the cause was brought down to to be heard at sittings for the trial of actions in the Chancery Division, but the learned Judge at the trial refused to entertain the case as it came from a Common Law Division.

Held, reversing the ruling of the taxing officer that the plaintiff was entitled to the costs of the day.

Leonard, for the appeal.

Aylesworth, contra.

[OSLER, J., 2ND MARCH, 1883.]

COGHILL v. CLARK.

Promissory note—Amendment of defence—Setting up want of stamps.

Held, on appeal from the Master in Chambers, affirming his decision, that the defendant should not be allowed to amend his defence by setting up that the note sued on was unstamped, on the ground that it was purely a technical defence.

Rose, Q.C., for the appeal.

Justin, contra.

[THE MASTER IN CHAMBERS, FEBRUARY, 1883.]

ARMITAGE v. ARMITAGE.

Partition—Commission—Costs of procuring cheques for parties entitled.

In a partition matter, under G. O. 640, after the lands had been sold, the purchase money paid into Court, and the order for distribution made, the plaintiff's solicitors were instructed by certain legatees to obtain cheques for the amounts found due to them by the Master's report, and payable out of the proceeds of the sale. The solicitors procured the cheques and charged the legatees with the costs. Their liability for these costs was disputed, on the ground that the legacies should be paid them without any deduction whatever; that the estate should bear the expense of obtaining the cheques; and that the plaintiff's solicitors had already been paid for these services by the commission allowed them.

Held, that the solicitors were entitled to the costs in question; for it was no part of their duty, as solicitors having the conduct of the cause, to take out and deliver to legatees or creditors their respective cheques, but if

they notify them that they may attend and procure their cheques they have done all that is required of them.

W. Seton Gordon, for the solicitors.

G. W. Meyer, for the legatees.

(Reported by *W. Seton Gordon, Esq., Barrister-at-Law*).

[21ST FEBRUARY, 1883.]

THE GRAND TRUNK RAILWAY CO. v. THE ONTARIO AND
QUEBEC RAILWAY CO.

Appeal bond—Appellants' solicitors as sureties.

The appellants' solicitors executed an appeal bond as sureties, and on motion the bond was disallowed, though the solicitors were solvent.

[23RD FEBRUARY, 1883.]

READE v. GIBSONE.

Married woman—Personal property—Next friend.

The plaintiff (a *feme covert*) was married between 1859 and 1872, and claimed to be entitled to a fund in remainder, the securities for which had been converted into money by the executor of the tenant for life, who now claimed that it belonged to his testator's estate. In an action to recover the fund the plaintiff sued alone, and a motion was made to stay proceedings until a next friend had been joined.

Held, that the fund was the plaintiff's separate property within the meaning of R. S. O. cap. 125, sec. 5, and therefore that she had the right to sue for its recovery in her own name, under sec. 20 of that Act.

H. Cassels, for the motion.

Plumb, contra.

[24TH FEBRUARY, 1883.]

In re A SOLICITOR.

Solicitor and Client—Taxation—Criminal business.

A solicitor, who was also a barrister, had performed certain services in a criminal proceeding and had acted therein as counsel for his client, and had received moneys on account of these services.

Held, that he was bound to deliver his bill for taxation.

Schoff, for the motion.

King, contra.

H. C.

KOHFREITSCH v. MCINTYRE.

Promissory note—Plea of Fraud—Particulars.

Action on a promissory note. Defendant, among other defences, pleaded:

"7. The defendant further says she was induced to sign same by the fraud of the plaintiff, or others with the plaintiff's consent or knowledge, at the

time of his receiving the same." Particulars of the fraud alleged were demanded in writing but not furnished.

Holman, for the plaintiff, now moved to strike out the above paragraph of the statement of defence, on the ground that it did not disclose the particulars or circumstances of the fraud alleged, or for an order requiring the defendant to furnish in writing particulars of the fraud alleged in said paragraph, and that unless such particulars were delivered within two days said defence be struck out.

Aylesworth, for defendant, contra.

THE MASTER IN CHAMBERS, 27TH FEBRUARY, 1883, after reserving judgment, held that instead of the circumstances of the fraud being given by particulars they should be alleged in the statement of defence, in conformity with the mode of pleading formerly in vogue in the Court of Chancery; and he made an order for amendment of the statement of defence accordingly. Costs in the cause.

H. C.

HANDS v. DINGMAN.

Affidavit sworn before party's solicitor.

Held, that an affidavit, even where it is not to be used on behalf of the party making it, should not be sworn to before a commissioner who is that party's solicitor.

H. W. M. Murray, for the motion.

Geo. Macdonald, contra.

REGINA *ex rel.* BRINE v. BEDDOME.

Municipal Councillor—Qualification—Assessment Roll—Officer of Corporation as relator—Costs.

Held, that the assessed value of property must govern in determining the qualification of a Municipal Councillor, and not the value as sworn to by a valuer, on a motion to avoid the election.

The relator was one of the auditors of the Municipality of Parkdale; and the learned Master in Chambers said:—"Under the case of *Regina ex rel. McMullen v. De Lisle*, 8 U. C. L. J. 291, I must give no costs. I think it is perhaps not as objectionable that an auditor should become a relator as the Clerk of the Council, as some of the consequences pointed out by the Chief Justice would not apply to an auditor. But the principle of the case is that officers of the Municipality must keep out of such proceedings. The relator here is an officer in the confidence of the corporation as an auditor, and his being a relator strikes me as inconsistent.

Aylesworth, for the relator."

H. W. M. Murray, contra.

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THE PRIVY COUNCIL AND THE CHURCH OF ENGLAND IN CANADA.

IN many of the colonies, and particularly in Canada, valuable grants of land have in the past been made by the Crown and individuals, to the uses and purposes of the Church of England; and the right to the use and enjoyment of these lands must depend on the ability of the body which claims them to establish that it is the Church of England or a part of the Church of England. In the recent decision of the Privy Council, in the case of *Merriam v. Williams* (a), it was said that mere identity of name is not essential to the union of a Colonial Church with the Mother Church as by law established, and that the same system of appointing Bishops need not prevail in the Colonial Church as in the Mother Church in order to maintain the bond of union. The Church in the colony in question in that case was styled "The Church of South Africa," and the question to be determined was not, it is true, whether the Church of South Africa was a branch of, or identical with, the Church of England, but whether it was *connected with the Church of England as by law established*, and their Lordships of the Privy Council were of opinion that to establish this connection it was necessary to show a substantial identity in their standards of faith and doctrine. And their

(a) L. R. 7 App. Ca. 84: 47 L. T. 51.

Lordships were further of opinion that the standards of faith and doctrine of the Church of England are not to be found only in the texts, but also in the interpretations which those texts have from time to time received at the hands of the tribunals by law appointed to declare and administer the law of the Church.

Now, the Church of South Africa in its *Articles of Constitution*, had adopted the following clause :—"The Church of the Province of South Africa receives the doctrine, sacraments and discipline of Christ as the same are contained and commanded in Holy Scripture, according as the Church of England has received and set forth the same in its standards of faith and doctrine, and it receives the book of Common Prayer, and of ordering of bishops, priests and deacons, to be used according to the form therein prescribed in public prayer and administration of the Sacrament and other holy offices, and it accepts the English Version of the Holy Scriptures as appointed to be read in Churches, and further, it disclaims for itself the right of altering any of the aforesaid standards of faith and doctrine. Provided that nothing herein contained shall prevent the Church of this Province from accepting, if it shall so determine, any alterations in the formularies of the Church (other than the creeds), which may be adopted by the Church of England, or allowed by any General Synod, Council, Congress, or other assembly of the Churches of the Anglican Communion, or from making, at any time, such adaptations and abridgments of, and additions to, the services of the Church as may be required by the circumstances of this Province; provided that all changes in, and additions to, the services of the Church, made by the Church of this Province shall be liable to revision by any synod of the Anglican Communion, to which this Province shall be invited to send representatives.. Provided also" (and here comes the rub), "that in the interpretation of the aforesaid standards and formularies the Church of this Province be not held to be bound by decisions in questions of faith and doctrine, or in questions of discipline relating to faith and doctrine other than those of its own ecclesiastical tribunals,

or of such other tribunal as may be accepted by the Provincial Synod as a tribunal of appeal." And their Lordships solemnly decided that this last proviso had the effect of destroying the connection between the Church of South Africa and the Church of England *as by law established*, and that, therefore, the Church of South Africa was not entitled to the benefit of endowments settled to uses in connection with "the Church of England as by law established."

It might at first sight be supposed that the Church of South Africa had emancipated itself from any obligation to accept the decisions of the Privy Council as a correct interpretation of the articles and formularies of the Church of England, but a slight examination of the subject will, we think, suffice to show that this is very far from being the case. The interpretation of the standards of the Church of England by the Privy Council, and other Courts to which their Lordships refer, has not been based upon the principle of the Courts settling by authorities what the doctrine of the Church of England on the points of controversy may be. On the contrary, in the celebrated case of *Sheppard v. Bennett* (b), the Privy Council expressly disclaimed the functions of a Synod, or Council, and distinctly stated that their duty was confined to ascertaining whether certain statements (and they might have added 'and acts') are so far repugnant to, or contradictory of, the language of the articles and formularies, construed in their plain meaning, that they should receive judicial condemnation."

Now, if the duty of the Courts was to construe in their plain meaning the articles and formularies, it may reasonably be presumed from a legal point of view, that they have done so. Any other construction, therefore, than that which they have arrived at, would not be their plain meaning, and therefore, the construction of the Privy Council as a matter of law is the only meaning of which the articles and formularies are susceptible (c).

(b) L. R. 4 P. C. 371.

(c) This seems to be an undeniable proposition, except only so far as a different interpretation is necessitated, by reason of the difference in the

Now, the Church of South Africa, although it disclaims being bound by decisions in questions of faith and doctrine, or in questions of discipline relating to faith and doctrine, other than of its own ecclesiastical tribunals, or of such other tribunal as may be accepted by the Provincial Synod as a tribunal of appeal, cannot, after all, in any case where rights of property are involved, thus rid itself of Privy Council jurisdiction, unless it can be said that the Privy Council on an appeal being brought before it, would, in any case in which any decision of the Spiritual Courts of South Africa was in question, give effect to a decision of those tribunals, giving a different interpretation to the articles and formularies from that which the Privy Council had itself declared to be the true, and therefore, the only correct interpretation of them. If for instance, to take the case suggested by their Lordships themselves, a clergyman should be condemned as a heretic and deprived of his benefice by the Spiritual Courts of South Africa for preaching the doctrines in question in the cases of *Gorham v. The Bishop of Exeter* (d), and *Williams v. The Bishop of Salisbury* (e), would the Privy Council, on an appeal to it, be bound to accept the interpretation put upon the articles and formularies by the African Spiritual Court in preference to its own? We do not think that it would as a matter of law. And the reason why we think the Privy Council would refuse to be bound by any decision of any domestic or inferior tribunal at variance with its own, is this. In any matter of controversy arising in the South African Church, the Court would be bound to treat the litigants simply as the members of a voluntary society, of which the articles and formularies constituted as it were its by-laws; in short, just as though they were members of a Club, and precisely the same rules which are laid down in cases of wrongful expulsion from clubs would be applicable. If a litigant claimed that he had been

locality in which the question in dispute may arise, e.g., the question might arise as to how far the Elizabethan advertisements could control the construction of a rubric in a locality where the advertisements were never in force.

(d) Moore Spl. Report, 1852.

(e) 2 Moore P. C. N. S. 375.

wrongfully expelled or excommunicated, and had been thereby deprived of temporal rights, and privileges, the Court would, as was done in the Courts of Ontario, in the case of *Cannon v. Corn Exchange* (f), enquire whether the rules of this voluntary society by which all the members were bound had been truly and correctly interpreted, and if, as in *Cannon v. Corn Exchange*, the Court should find that, according to its view, the rules of the Society had been incorrectly interpreted by the domestic forum, then the expulsion would be declared invalid.

So far as questions involving civil rights are concerned, which are susceptible of litigation before the Civil Courts, we think, therefore it is exceedingly problematical whether the Church of South Africa has succeeded in relieving itself from accepting the interpretations of the Privy Council.

But although this is so in cases where property and civil rights are involved, there may, it would seem, be questions involving merely the ecclesiastical status of individuals, in which the decisions of the domestic forum could not be revised by any civil Court.

Cases, for instance, like that of *Forbes v. Eden* (g), where Lord Colonsay laid down the rule that a Court of law will not interfere with the rules of a voluntary association unless to protect some civil right or interest which is said to be infringed by their operation; or the case of *Dunnet v. Forneri* (h), where Proudfoot, V.C., held that the Court of Chancery for Ontario had no jurisdiction to enquire into the regularity of the excommunication of an individual, there being no question of civil rights or property involved.

But the immunity which the Church of South Africa has obtained from accepting Privy Council decisions seems to be limited only to this comparatively small class of cases. In all cases involving rights of property, it would appear to be as much bound to submit to the decisions of the Privy Council as the Mother Church.

(f) 27 Gr. 35 ; 5 App. R. 268.

(g) 1 H. L. C. Sc. 569.

(h) 25 Gr. 199.

The result of this somewhat anomalous condition of affairs is this, that a man may be condemned, and even excommunicated by the spiritual authorities of South Africa as a heretic, and yet, nevertheless, be maintained by the civil power in full possession and enjoyment of all the rights of property, and temporal privileges, which accrue to him by virtue of his spiritual office, as though he were perfectly orthodox.

This may seem a state of things peculiar to the Anglican Church, but it is one to which every other religious body within the British Dominions is similarly subject.

There is also this further anomaly that two religious bodies may be identical in faith and doctrine and discipline, and spiritually united, and yet be legally two, as is the case as regards the Church of South Africa and the Church of England as by law established.

GEO. S. HOLMESTED.

MORTGAGE SUITS.

It is questionable whether it would not be in the interest of suitors, that the time allowed in mortgage suits for payment of the amount found to be due by the Master's report should not be very much shortened. It is proposed in this article to adduce some reasons why this should be done.

In simple mortgage cases, where the defendant resides within the jurisdiction, and there are no subsequent encumbrances, it generally takes seven or eight months before the mortgagor's interest can be foreclosed, and, if a sale be desired, then a month or longer elapses; where, however, the defendant resides out of the jurisdiction, or where there are subsequent encumbrances, then a very much longer time is required to obtain foreclosure or sale.

If the property mortgaged is much more valuable than the amount due on it, the mortgagor usually gets a fresh loan and pays the mortgage off; in this way getting an extension of time; or if foreclosure is sought he frequently demands a sale, and consents to an immediate sale, with a view to lessen the accumulation of interest. So it may be assumed that, in those cases where the suit proceeds in the usual way to foreclosure or sale, it is because the property is mortgaged to its full value, or so nearly so that the mortgagor is powerless to relieve himself from his embarrassing position. Thus a great hardship is suffered by the creditor, who is delayed in realising his security, and the security itself is diminished in value by the amount of interest that has accrued.

One prejudicial effect of the length of time necessary to foreclose or sell in the Chancery Division of the High Court of Justice, is to deter a large number of practitioners from resorting to that forum in proceeding against defaulting mortgagors, and of causing them to adopt the more speedy method of proceeding under the power of sale, which is

usually inserted in mortgages. In many ways this seems to the writer to be to the disadvantage of the mortgagor.

When properties are sold under powers of sale, the safeguards thrown around the interest of the mortgagor in the Chancery Division are wanting ; the advertisements are frequently framed in such a way that it is difficult to determine the exact locality of the property ; they seldom contain descriptions of improvements, nature of soil or any of those particulars which, in the interests of the mortgagor, should be inserted in the advertisement.

Indeed it depends entirely upon the solicitor conducting the proceedings whether the sale is properly advertised or not, and it is a difficult matter for a solicitor in a large practice to pay minute attention to such matters of detail.

After a sale has taken place in pursuance of a power of sale, unless great care is taken to preserve the notices of sale, and other evidences of the proper exercise of the power, difficulties arise in proving the title ; whereas in the Court of Chancery these all remain on record in the Master's Office, preserved for all time to come, in a regular and systematic manner, and if original orders are lost office copies are easily obtained. It must not be lost sight of that when proceedings are taken under a power of sale, the vendor must be in a position to give possession to the purchaser. This involves the costs of an action to recover the land, and as a writ is usually issued on the covenant, in order to obtain judgment for any deficiency, there are the costs of the two actions and the proceedings under the power of sale, which would average much more than the costs of a suit in the Chancery Division, by which all the same objects would be attained.

The writer would suggest that the time for redemption in a mortgage suit should be limited to one month, with power to a Judge in Chambers to extend the time on good cause being shown.

RICHARD H. R. MUNRO.

RECENT ONTARIO LEGISLATION.

The first four chapters of the Statute Book of Ontario, for 1882-3, are uninteresting. It is only when, in chapter 5, entitled "An Act to establish Public Creameries," the Government indicates its intention of going into the dairy business, that our curiosity is excited. It recalls to mind what is frequently stated in tones of bitterness by the little few who repent Confederation, that Ontario is the milch cow of the Dominion. If this aphorism be true, the Act in question shows the wisdom of the Legislature in keeping the cream for Ontario and making butter of it. How far the Provincial creameries may become subject to the regulations of the Federal Parliament respecting Trade and Commerce, may prove an interesting question.

The Court of Appeal.—By section 2 of chapter 6, the numerical strength of the Court of Appeal is increased to five judges. We do not know whether this is an effort to relieve this Court of the stress of work under which it has been labouring for some time. If it is such an effort it appears to be ill directed. Five judges, whose duty it is to sit together, will get through the work no sooner than four under the same circumstances. By dividing the labour of writing judgments, so that (for example) five judges write the judgments in five cases simultaneously, the end is reached of disposing of the work. But such a principle (if that be the one underlying this enactment) is a dangerous one, and its evils are too apparent to induce one to believe that it would be adopted by the judges themselves. The day must come, and that not long hence, we apprehend, when this Court must be relieved of circuit work, and then and not before will there be a clean docket.

Any hopes that the benefit of the Court of Appeal was directly aimed at by this section are rudely shaken by the following one, the 3rd, which declares that it shall be the duty of one of the judges of Appeal to sit in the Chancery

Division from time to time. Why not have increased the strength of that Division at once? Why not have called into existence another seat in a Court below with power to its incumbent to do occasional duty as an Appellate Judge, rather than have created a new Justice of Appeal, with the burden cast upon him and his colleagues of doing duty in a Court below?

Sale of goods under attachment.—By the Act respecting Absconding Debtors, R. S. O. cap. 68, section 14, the sheriff has power to sell perishable property seized under an attachment against an absconding debtor upon certain conditions. The plaintiff is obliged to give security to the defendant for the appraised value of the goods for damage, etc., occasioned by the seizure, etc., in case he do not recover judgment against the defendant. By section 4 of chapter 6 of the statute under review, the Court may at any time after a writ of attachment has been in the sheriff's hands for one month, direct the sheriff to sell the goods. The order is to be made (s-s. 2) at the instance of an attaching or execution creditor, and upon the judge being satisfied that the alleged debtor has in fact absconded indebted to the applicant, and that the property is not sufficient to pay in full the claims of the persons who have sued out writs of attachment or execution.

It will be noticed that in order to obtain a sale there must exist the following essentials:—1. The writ of attachment must have been in the sheriff's hands for one month. 2. The application is to be made by any attaching or execution creditor. 3. The judge making the order must be satisfied that the debtor has absconded indebted to the applicant; and 4. That the property attached is insufficient to pay in full the claims of the attaching or execution creditors.

And these are again subject to the following conditions prescribed by s-s. 3:—5. No writs execution placed in the sheriff's hands after the writ of attachment shall take priority over it, but all executions placed in his hands prior to the distribution shall share ratably; but 6. Subject to any priority given for costs under the first writ of attach-

ment. And by s-s. 4 the 20th and 21st sections of the Absconding Debtors Act, R. S. O. cap. 68, are repealed.

It will be noticed that lands are excepted from the operations of this Act.

To take the last condition (No. 6) first. By section 20 of the Absconding Debtors Act, an execution creditor, in an action commenced before the writ of attachment issued, who obtained his execution before the attaching creditor, took priority, subject, if the Court or a judge so ordered, to the prior satisfaction of all costs of suing out and executing the attachment. "Clearly," says Osler, J., in *Hughes v. Field*, 9 P. R. at p. 128, "the object of this last provision was to save harmless the *bond fide* attaching creditor, whose writ has had the effect of saving and protecting the debtor's property for the execution creditors." And his Lordship interpreted this provision in favour of the first attaching creditor and no others. But since the priority of the execution creditors is abolished, and since section 20 of the Absconding Debtors Act which gave priority to the first attaching creditor for his costs is repealed, one is at a loss to know the meaning of s-s. 3 of the Act in review, so far as it relates to priority of the first writ of attachment for costs. No express priority is given by this Act, and none existed as far as we know, except under the Absconding Debtors Act.

With respect to the second essential above mentioned, it is apprehended that the execution creditor referred to who may make the application, is one who places his writ of execution in the sheriff's hands after the receipt by the latter of the writ of attachment. It would require plainer words than those used to curtail the rights of an execution creditor under whose writ, the sheriff was in possession, or was in a position to seize when the attachment issued.

With respect to the third essential, in the case of an application by an attaching creditor, the facts of the debt and the absconding must be proved upon affidavit before the writ of attachment issues; and in the case of an application by an execution creditor, it would seem superfluous to ask for proof of anything more than that the execution

remains unsatisfied. Indeed, it is not easy to conceive of an application by an execution creditor who has been satisfied.

The fourth and fifth requisites may be considered together; and they give rise to serious reflection. Under s-s. 2, though the order for sale is to be made only upon upon certain conditions, of which the insufficiency of the property to satisfy the creditors is one, it is expressly stated in the same sub-section that this is not to be construed to restrict the authority of the court or judge to make an order in other cases. If the authority to make an order for sale had been general in its terms, no difficulty would have arisen, and the order might have been made in all cases; but where one of the conditions precedent to the making of the order is the insufficiency of the property to satisfy the creditors, it gives us reason to suppose that the draftsman had in his mind the ratable distribution of the estates of absconding insolvent debtors. If this be the object of the enactment, and sub-sec. 3 gives countenance to it, the Legislature would be exceeding its authority. No doubt the Provincial Legislature has power to make any provision as to the priority of executions, where such priority or such process is the subject-matter or primary object of the legislation. And if sub-sec. 3 had aimed at giving priority to writs of attachment over writs of execution in ordinary actions, no doubt the enactment would have been valid. It is, however, inconceivable that the intention should be to abolish priority where there is sufficient to satisfy all, and sub-sec. 3 is consequently ineffectual, as well as unnecessary, if directed to cases where there is enough to satisfy all creditors. The use of the phrase "rank ratably in proportion," coupled with the reference to the priority of the first writ of attachment for costs, gives ground for the belief that the section was passed to meet the case of an insolvent estate. If the Legislature has no power, otherwise, to provide for the ratable distribution of an insolvent estate under cover of regulating the priority of writs, the mere fact that the debtor absconds and leaves his estate to his creditors, cannot give jurisdiction to the legislature so to deal with such estates. Under these cir-

cumstances the validity of the enactment may well be called in question.

The absolute repeal by sub-sec. 4 of section 21 of the Absconding Debtors Act, gives further countenance to the supposition that the Act is aimed at a ratable distribution of the insolvent estates of absconding debtors. By that section, where a prior execution obtained under section 20 had been obtained by collusion or fraud, it might have been set aside, or the proceedings stayed, upon the application of an attaching creditor. The fact that the *priority* has been obtained by collusion or fraud is now of no moment, if the execution reaches the sheriff after the writ of attachment; for the collusive judgment creditor ranks equally with all others by the Act under review. Where the judgment itself is fraudulent, *i.e.*, where it has no foundation, of course it might always have been and may still be set aside. But the question will arise, what is a fraudulent judgment? Under section 21, it was fraudulent to give priority over other creditors, and thus defeat them; though the same facts would not make a judgment fraudulent under R.S.O. cap. 118, where the debtor did not abscond, provided only the dangers of the first section of that Act were avoided. Where a favoured creditor who has knowledge which enables him to issue a writ, obtains judgment and places his execution in the sheriff's hands before the latter receives the writ of attachment, though after its issue and after the absconding, it is apprehended that the execution takes priority over the attachment, though before the repeal of this section 21, such a judgment might have been set aside or the proceedings stayed, as being collusive and defeating the just claims of other creditors. By preferring a creditor in such a manner when on the point of absconding, a debtor may, if our surmise be correct, defeat the whole object of the enactment, whereas if the section 21 had been amended by striking out the words "such prior," in the first line thereof, such a contingency would have been provided against.

Constitutional Questions.—Section 6 of the Act under review provides that, when the constitutional validity of any

Act of the Parliament of Canada, or of the Legislature of Ontario, comes into question in any civil proceeding, it shall not be adjudged invalid until after the Minister of Justice and the Attorney-General of Ontario have been notified. The notice is to point out the section of the Act which is in question, and the day on which the case or the question is to be argued, &c., with particulars of the constitutional point proposed to be argued; it is to be a six days' notice, unless otherwise ordered, and the Minister of Justice and the Attorney-General are to be heard, either in person or by counsel.

The first thing that strikes one in reading this section is, that though the expense of litigation in such cases is largely increased, no provision is made for the increased costs. It will also be noticed that the privilege is accorded the Courts of adjudging any Act to be valid without calling upon the Minister of Justice or Attorney-General. Doubts have been expressed as to the validity of this section, but it appears to be within the jurisdiction of the Legislature. It is an enactment aimed at the courts over which the Legislature has jurisdiction, and it deals with the procedure to be observed when the validity of an Act comes into question. Though its validity was not expressly questioned in *Hately v. Merchants' Despatch Co.*, (*postea* Occasional Notes,) the Divisional Court of Queen's Bench recognized its obligatory force. No provision is made for the order in which the Minister of Justice and Attorney-General are to interfere. We presume that where an Act of the Provincial Legislature is attacked, the party defending will have imposed upon him as counsel either the Attorney-General or his nominee. Apparently the procedure pointed out in this section must be observed in any case involving it until the disposition of it by the Court of Appeal. Beyond that we presume the Legislature is powerless to affect the procedure.

The Conveyancing Bill.—This measure, which was promised at the opening of the Legislature, is conspicuous only in being absent—probably because, though a coach and four could not have been driven through it, a great number of other conveyances might have been.

EDITORIAL REVIEW.

The Province of Professional Journalism.

The *Albany Law Journal* seizes the opportunity of defining its position with respect to criticisms of judicial decisions by concurring with the following expression of opinion by the *Western Jurist*:—"We are in receipt of many communications inquiring as to our silence concerning certain, in the opinion of correspondents, erroneous decisions of the Supreme Court of this State. Now, we desire to say here that we do not assume to act as superior to our Supreme Court, and do not feel called upon to assail its decisions whenever it may see fit to differ with the opinion of the bar or that of other Courts. Occasionally, when that Court rules contrary to its own previous decisions, or to the law as recognized by the majority of the Courts, we feel at liberty to review their work and point out wherein we believe them to be in error. Courts are not infallible; they do not claim to be so; and it is showing no disrespect to them to call their attention to errors unintentionally committed; and when such instances occur we are glad to have our attention called to them, if they have been overlooked by us. But these do not afford excuse for assailing the supreme tribunal of a State whenever its views happen to be at variance with our own. It is highly important that our Courts have the respect and confidence of all parties, and it does not become any journal to lessen these by any utterances of its own."

Between these two excellent and ably conducted journals we should have expected to see the province of professional journalism more clearly defined.

We are led gently from a modest disclaimer of superiority over a Supreme Court, to the expression of a conscious ability to detect and rectify error in the decisions of such an august tribunal, which shakes our belief in the existence of the modesty. This doubt as to the existence of any modesty in the critic becomes absolute infidelity, when the learned writer, by subjecting the Courts which "are not infallible" to the rectifying pen of a journalist, leads us still gently onwards towards the infallible test of journalistic acuteness. The danger of lessening the respect and confidence of all parties for the Courts by "assailing" them when they go wrong, is much less than the danger that the assailing party will lose the respect and confidence of his readers. Indeed, we do not know what better opportunity a journalist could desire for showing his inferiority to the members of the Courts than by "assailing" them when he conceives them to be wrong. One such attack and we could dispense with any more disclaimers of superiority.

We must except from the province of journalism all manner of reporting. The publication of reports of cases adds value to a journal, but is not its primary object. News travels too rapidly to be sought for in monthly, fortnightly, or even weekly publications. Journalism proper therefore includes merely the discussion of the leading topics of the day, and the publication of essays and reviews. The respectful criticism of decided cases is perforce the foundation of all essay writing in our profession. And we cannot conceive of a better opportunity for such criticism than the doubtful decision of a doubtful and debated point. Such respectful criticism will neither lower the tone of a journal nor lessen the respect due to the Bench. We do not feel it to be a duty to preserve silence whenever a decision of one of our Courts appears to be doubtful or debatable. On the contrary, we believe such an event is the best opportunity that offers itself for opening up what may be a useful discussion upon the subject matter of the decision.

The Critic of the Supreme Court, and his Critic.

It is a great pity for professional journalism that the despatch of a special newspaper correspondent should have been the occasion of making a great ado over a matter which seems to us to be so easy of explanation and referable to well-known causes. In *Grant v. Beaudry*, Mr. Justice Gwynne is reported to have said that the expression of opinion in the Court of Queen's Bench of the Province of Quebec on the merits of the action was "extra-judicial and unwarranted." If the special correspondent had not thought fit to despatch a message to his newspaper that the Court of Queen's Bench had been *censured* by the Supreme Court, we should perhaps have heard nothing more about the matter. But "R." undertakes the defence of the Queen's Bench, in the *Legal News*, and is brought to task by the Editor of the *Canada Law Journal*. Leaving out of the question this despatch, we think a calm consideration of the whole affair will disclose a reason for the expression of opinion in the Court below, and a reason for the expression used by Mr. Justice Gwynne in the Supreme Court. "R." very clearly shows (6 Leg. N. 41) that the system of jurisprudence which obtains in Quebec permits the Court to express its opinion upon all the issues in a suit before the Court. On the other hand, it is just as clear that the system of jurisprudence which we enjoy in the Province from which Mr. Justice Gwynne comes, does not permit of this—that is to say, the utterance of the Court on a matter not necessary for the decision of the Court is uncalled for and is not authoritative. We may say it is unwarranted and extra-judicial. This is the natural result of a system of traditionary law. There is one exception to this, though perhaps it is not properly an exception; and that is where the parties waive preliminary objections and technicalities in order that the merits may be pronounced upon. Thus the Court has plenary jurisdiction. It appears from "R.'s" remarks that the parties

desired the opinion of the Queen's Bench upon the merits of *Grant v. Beaudry*, though we believe the defendant did not waive his right to rely upon his preliminary objection. If this did not appear upon the record in the Supreme Court of Canada, we think a learned Judge, accustomed to dealing only with those issues which are absolutely necessary for the decision of a controversy, might be pardoned for disposing of the unnecessary issues with a phrase which was never intended to carry any offence with it. The expression is not improperly used in dealing with *obiter dicta* in decisions pronounced under a system which makes those decisions binding authorities. The danger of making law by gratuitous opinions is manifest. Thus the feeling expressed in "R.'s" remarks, and the innocent expression of Mr. Justice Gwynne, are plainly due to the education of two men under two distinct systems of jurisprudence.

A little thought upon this might have saved a criticism sufficiently warm in expressions to disclose the learned writer's mood when he penned his remarks.

We cannot, however, agree with our contemporary the *Canada Law Journal* (19 C. L. J. 81), that the language is "quite as outrageous and unjustifiable as any that has yet appeared in the columns of the most reckless partizan sheet." The "difficulty in conceiving it possible for any lawyer to take the ground advanced by this writer" is very much lessened by reference to the mode of education of lawyers in a system of jurisprudence almost as much unlike ours as it is possible for it to be. While pointing out to "R." how he may find many such expressions in English jurisprudence, our learned friend closes his eyes to the fact that the occasion which gave rise to the expression appears to be not unusual or unjustifiable in the French law. If the one critic is narrow, then so is the other. If the language of the criticism is unjustifiable, the language used in the observations upon it certainly does not profit by the comparison.

The Late Master of the Rolls.

The newspapers announce the death of Sir George Jessel, Master of the Rolls, one of the very ablest of

English judges. The *Law Journal* of 17th March, observes that, "the medical attendants of the Master of Rolls consider that his health has so materially improved that it is unnecessary for him to take any holiday other than the usual Easter vacation, which he is expected to pass in the South of France. In these circumstances there is every reason to hope that he will be in his place on the bench at the beginning of the next sittings as usual." His demise must, therefore, have been sudden.

His Lordship's death will be a great loss to the bench. His caustic judgments, besides being indicative of great mental power, have a subtle influence about them which carries conviction to the reader.

He is succeeded by Mr. Horace Davey, Q.C. Mr. Davey is known to Canadians principally as having been of counsel for the appellant in *Dobie v. Temporalities Board*, L. R. 7 App. Ca. 136, and for the respondents in *Western Counties R. Co. v. Windsor & Annapolis R. Co.*, L. R. 7 App. Ca. 178.

The County Bench.

In the County of York, Judge Boyd is promoted to the office of County Judge, from that of Junior Judge of the County Court which he has so long filled. He is also, as a consequence, gazetted a Local Judge of the High Court of Justice and Judge of the Maritime Court of Ontario.

Mr. Joseph E. McDougall receives his patent as one of Her Majesty's Counsel, and is gazetted Junior Judge of the County Court of York, in the place of Judge Boyd. This appointment is most popular as well as being a judicious one, and deservedly so. Mr. McDougall has the confidence of the whole profession in his ability and learning.

Mr. R. B. Carman, of Cornwall, has been appointed Junior Judge of the United Counties of Stormont, Dundas and Glengarry.

Lord Coleridge's Proposed Visit.

We observe that the Lord Chief Justice of England has accepted the invitation of the New York Bar Association to visit New York during the coming summer.

We seriously hope that the Benchers of the Law Society of Upper Canada will at once supplement this invitation by an invitation to his Lordship to visit Toronto.

We have no reason to be ashamed of either Bench or Bar in Canada, and Osgoode Hall, the seat of our Society in Ontario, is a building we may well be proud of. We think it would be a great pity that his Lordship should return to England without having been welcomed by his own profession in one of the most important of Her Majesty's Dominions.

CORRESPONDENCE.

Parum Claris Lucem Dars.*To the Editor of the Canadian Law Times :*

SIR,—Has not the Editor of the Supreme Court Reports gone with his staff into Latin latitudes, when, at pages 610 and 611 of vol. vi., he makes Lord Brougham speak twice of *dolus clarus locum contractui*. The head note on page 31 mentions an intention to *affect* an insurance for his own benefit. In *Shultz v. Wood*, at page 621, Ritchie, C.J., closes his judgment allowing the appeal by stating that, in his opinion, the appeal should be dismissed. In this volume we are treated to a dish of dates in season and out of season. The cases run in the following general order—1881, 1882, 1880, 1881, 1882, 1881, 1882, 1881, 1882, 1881, 1879, 1881. There seems to be a *penchant* for the past, becoming uncontrollable at times, pages 298 and 397 being a year older than the other pages that surround them and loiter with them about the Supreme Court Sitzings. *Moore v. The Connecticut* (1879) seems almost an anachronism, and must be weary after nearly four years of travail. Cannot the delivery to the profession be facilitated?

Yours, etc.,

BELLEVILLE.

THE
CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

[6TH MARCH, 1883.]

ALLAN v. MCTAVISH.

Special leave to Appeal—Delay.

In January, 1878, this Court reversed the decision of Morrison, J., who held, upon a demurrer to a defence, that the statutory limitation of ten years under R. S. O. cap. 108 applied to an action upon a covenant contained in a mortgage for payment of the mortgage debt. The defendant acquiesced in that decision until the Court of Appeal in England, in a like case, expressed an opinion contrary to the holding of this Court, when he applied for leave to appeal to the Supreme Court of Canada.

Held, following *Craig v. Phillips*, L. R. 7 Chy. Div. 249, that the ground alleged was not sufficient to entitle the defendant to the relief asked.

SPRAGGE, C.]

BELL v. LEE.

*Will—Capacity of Testator—Insane delusion—Power of appointment—
Fraud on power.*

The judgment of the Court below, 28 Gr. 150, was reversed so far as the will was declared void on the ground of insane delusion.

The testator had the power of appointment of certain property amongst his children or to his brother or sister. By his will he gave about one-fourth to two of his children, and as to the residue he appointed the same to his brother, C. T. B., desiring him first to pay the testator's indebtedness to his father's estate and to release his life policy from such indebtedness; he then bequeathed to one E. B. the policy so relieved.

Held, that as to the portion of his estate given to his two children the will was valid; but that the appointment to C. T. B. was a fraud upon the power inasmuch as E. B. who was not an object of the power indirectly got the benefit of the appointment to C. T. B.

PROUDFOOT, J.]

DUMBLE v. DUMBLE.

Will—Construction of.

The judgment of Proudfoot, J., 29 Gr. 274; 2 C. L. T. 44, was varied by declaring that upon the death of the children the widow was entitled to their shares for her lifetime, and that upon the death of the widow the brothers and sister of the testator were entitled to the personal property absolutely.

DIV. CT., STORMONT, D. & G.]

[SPRAGGE, C. J. O., 6TH MARCH, 1883.]

MCDONALD v. MCARTHUR.

Promissory note—Presentment—Non-payment—Evidence as to no Funds.

Held, that, in an action upon a note payable at a certain Bank the plaintiff's case is complete on proof of the making, presentment, dishonour, and when necessary, protest and notice of dishonour, and that it is not necessary for him to prove that there were no funds for payment at the Bank at which it was payable.

McMichael, Q.C., for the appellant (defendant).

Falconbridge, for the respondent.

IN CHAMBERS.

COOPER v. DIXON.

County Court Appeal—Delay—Computation of Time.

Judgment was given in the County Court of the County of Bruce on the 3rd February, 1883, which was a Saturday. The March sittings of the Court of Appeal commenced on the 6th March, 1883. By order XL. of the Court of Appeal respecting County Court Appeals, "An appeal shall be set down to be heard at the first sittings of the Court for the hearing of arguments, which shall commence after the expiration of thirty days from the decision complained of."

Allan Cassels, now moved to dismiss the appeal on the ground that it had not been set down for hearing at the March sittings, thirty days having expired since the decision complained of before the Court of Appeal sittings commenced.

Aylesworth, contra, contended that Sunday being the first of the thirty days should not be counted.

BURTON, J. A., 20th March, 1883.—I think Sunday should not be reckoned in computing the thirty days where it is the first day; the motion is therefore premature and must be dismissed with costs.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 10TH MARCH, 1883.]

HATELY v. THE MERCHANTS' DESPATCH CO., *et al.*

Carrier—Damage to goods carried—Action by consignor—Non-suit—New trial—Joinder of consignee as co-plaintiff—Constitutional question—Notice to Attorney-General.

The plaintiff consigned a quantity of butter to parties in England, and shipped it by the defendant companies, on bills of lading describing the goods as shipped by the plaintiff to be delivered to —, or order or his assigns, he or they paying freight. The plaintiff endorsed the bills of lading. The consignees paid the drafts drawn upon them for the price, and the butter having been seriously damaged in transit, they made claim upon the plaintiff for the loss. The plaintiff sued the defendants for the damage, and was non-suited on the ground that he had not sufficient interest or was not the proper person to sue.

The Court, without holding that the plaintiff had no right of action, or deciding as to the effect of R. S. O. cap. 116, sec. 5, set aside the non-suit and directed a new trial, with leave to the plaintiff to add as co-plaintiff any or all of the consignees or endorsees of the bills of lading, the evidence already given to stand with any additions the parties might desire, reserving all costs.

The validity of R. S. O. cap. 116, sec. 5, was challenged on the ground that it was *ultra vires* as interfering with Trade and Commerce, but the Court refused to decide the point now, without notice to the Attorney-General and Minister of Justice, under 46 Vict. cap. 6, sec. 6 (O), which would involve great delay, the course adopted being the speediest and least expensive.

HENEBERG v. TURNER.

Foreign judgment—Action on—Rule 322—Motion for judgment—Documentary evidence.

The plaintiff sued upon a judgment obtained in Iowa, U. S. A.; the defendant pleaded, denying the judgment *inter alia*. Upon a motion for judgment under Rule 322, upon the pleadings verified by affidavit, and the production of an exemplification of the judgment, the Master in Chambers, against his own opinion of the effect of Rule 322, made the order, following *Hart v. Pew* (unreported), in which Wilson, C.J., had granted a similar order.

Held, that the order of the Master in Chambers was wrong, the defendant having put the judgment distinctly in issue, and no attempt having been made by examining him or otherwise to show that the defence was false.

In proceeding under Rule 322 more would be required of a plaintiff than producing a document on which he relied without any proof to connect the defendant with it, or to support its genuineness.

SCRIBNER v. KINLOCH. THE SAME v. McLAREN. THE SAME v. PATERSON.

Stock in trade—Vendor employed as clerk—Change of possession—Chattel Mortgage Act.

Held, that the question of change of possession is one of fact to be determined upon the circumstances of each case, and (reversing the judgment of Osler, J., ante, p. 125, upon the facts there stated), that there was here such an actual and continued change of possession as to dispense with the necessity for a bill of sale; Hagarty, C.J., dissenting.

Per Hagarty, C.J. The question being one of fact, and the learned Judge having found as a fact that the change of possession was not actual and continued, his finding should not be disturbed, as it could not be said to be clearly wrong.

MACDONALD v. CROMBIE.

Interpleader—Preferential judgment—Sheriff's sale—Purchase by judgment creditor—R. S. O. cap. 118.

The judgment of Armour, J., ante p. 166, was reversed, Armour, J., remaining of the same opinion.

Per Cameron, J. The Statute R. S. O. cap. 118, should be construed strictly. It is in derogation of the common law and does not operate to give all the creditors of a debtor a ratable share in his effects. Before setting aside the debtor's honest preference for a legislative preference no more honest, it should be most clear that the debtor has done something which brings him within the enumerated acts which the Statute prohibits him from doing.

THE FIRE INSURANCE ASSOCIATION AND THE DOMINION
F. & M. CO. v. THE CANADA F. & M. CO.

Fire insurance—Re-insurance—Waiver of conditions by insured—Statutory conditions.

The Dominion F. & M. Co. entered into an agreement with the defendants by which the latter were to re-insure the former against loss by fire. A policy in favour of H. was one of the Dominion F. & M. Co.'s risks, and it was re-insured for half the amount. Subsequently the Dominion F. & M. Co. for valuable consideration sold the good-will of their fire insurance business to their co-plaintiffs, who re-insured the risks subject to the terms of the company's policies; the association were to accept all re-insurances effected by the company with any other Company, and power was given to use the Company's name. A loss occurred on H.'s policy which was adjusted and paid by the Association. It appeared that the Dominion F. & M. Co. had assented to a chattel mortgage by H. of some of the goods insured without the defendant Co.'s assent and knowledge.

Held, that the statutory conditions could not be imported into and read with either the agreement for re-insurance between the plaintiffs or that between the plaintiff and defendant companies.

Held, also that the contract for re-insurance did not prevent the plaintiff companies from assenting to any reasonable and proper waiver of conditions made in good faith and not shown to influence the loss or increase the burden of the re-insurers; and therefore the assent to the chattel mortgage did not release the defendants.

ELLIOTT v. BROWN.

Conveyance by married woman—Want of certificate—Possession contrary to Deed—R. S. O. cap. 128, ss. 13, 14.—Curing defect.

A., a married woman, in 1834 by deed joining with her husband purported to convey the East $\frac{1}{2}$ of a lot to T. in fee simple. The conveyance was void

in not having the proper magistrate's certificate endorsed thereon. T. never took possession, but in 1852 conveyed to H. through whom by various mesne conveyances the plaintiff claimed. Shortly after the conveyance to T., he told A. that he would not live on the land or have anything to do with it. A. then procured some one to look after it for her, and about sixteen years before this action two sons of A. went into possession of the West $\frac{1}{2}$ of the lot upon the understanding that they were to have the whole land, each paying her \$50 on account, but no deed was executed till 1875. They paid taxes on the whole lot and cut timber at times upon the East $\frac{1}{2}$. In 1871 E. having obtained a conveyance of the East $\frac{1}{2}$ had a line run between the East and West halves and cut timber on the East $\frac{1}{2}$. An action of trespass was brought against him by A.'s sons which he settled. The East $\frac{1}{2}$ was neither cleared, fenced, nor cultivated.

Held, Cameron, J., dissenting, that those claiming under A. in 1873, when 36 Vict. cap. 18 was passed, were not in the actual possession or enjoyment of the East half within the meaning of the proviso at the end of sec. 13 of that act, and therefore that A.'s conveyance to T., void in its inception, was validated by section 12 of that act (R. S. O. cap. 128, sec. 13).

Per Cameron, J. The possession of A. and those claiming under her must be construed with reference to her paper title to the land, which remained in her and passed to them, as her deed to T. was void, and it must therefore be held to have extended to the whole lot and not only to those parts actually occupied as in the case of a trespasser, and therefore the case fell within the exception in the Statute, and the deed was not validated.

HENDRIE v. NEELON.

Sale of goods—Non-delivery of part—Action for price—Counter-claim.

M. delivered part of a quantity of timber which he agreed to deliver to the defendant, and then assigned his claim to the plaintiff. The defendant counter-claimed for damages for the non-delivery of the remainder. It appeared in evidence that the defendant had refused to pay M. in full for the amount delivered, because of the claim for damages, but had extended the time for the delivery of the remainder of the timber, and that he had declared his willingness to complete the contract. A verdict was entered for the plaintiff by Galt, J., the defendant's counter claim being dismissed.

Held, that the counter claim should have been allowed; and a new trial upon the counter claim as to the damage sustained by the defendant was directed without re-opening the plaintiff's claim; costs reserved.

MACKENZIE v. DWIGHT.

N. Mounted Police land warrant—Assignment of—Representation as to right of holder.

The defendant was assignee of a land warrant issued to a constable of the N.W. Mounted Police Force for services in that body, which entitled him

upon its face to locate 160 acres of the Dominion lands subject to sale at \$1.00 per acre. The defendant induced the plaintiff to purchase the warrant by representing to him that he would be entitled to obtain from the Crown 160 acres of land. There were lands subject to sale at \$1.00 per acre when the warrant was issued and subsequent thereto. By various statutes and Orders in Council the Dominion lands were made subject to sale at higher prices than \$1.00 per acre, but these land warrants were to be accepted by the Crown in part payment of \$1.00 per acre. The plaintiff was refused lands at \$1.00 by the Crown, and then brought this action to rescind the sale of the land warrant to him on the ground of the misrepresentation.

Held, Armour, J., dissenting, that the plaintiff must fail, for the construction of the warrant clearly showed that the holder was entitled to 160 acres land at \$1.00 an acre, and not simply to a credit of \$160 on a purchase of land, and that the right to 160 acres at \$1.00 per acre could not legally be refused him.

Per Armour, J. The finding of the jury that the representation had been made that the warrant would entitle the plaintiff to 160 acres of land, comprehended the affirmation of fact by the defendant that there were then Dominion lands subject to sale at \$1.00 per acre, and this not being so the plaintiff should succeed.

HESSIN v. BAIN.

Married woman—Separate estate—Separate trader.

T. H. Bain being unable to carry on business on account of financial embarrassments, called on the plaintiff and told him this, and ordered goods to be shipped to the defendant, his wife, who was carrying on business as a grocer, either on her or his order, the account to be opened in her name. Goods were shipped accordingly upon several orders of the husband and one order of the defendant, and bills were drawn upon the defendant and accepted by her or in her name by her authority. She had separate estate.

Held, Hagarty, C.J., dissenting, that the plaintiff was entitled to recover.

Per Cameron, J. The defendant was liable, being possessed of separate estate, whether the goods were bought by her or by her husband. In the latter case she would be surety for her husband as acceptor of bills drawn upon her for the price of the goods.

Per Hagarty, C.J. The goods were bought by the husband and the liability was his and not the wife's, her name being used merely to shield him from his creditors, and the plaintiff was aware of this and therefore the defendant was not liable.

WHITE v. TOWNSHIP OF GOSFIELD.

Municipal works—Drains—Non-repair—Action for damages—Mandamus.

The defendants in 1865 passed a by-law for the construction of a drain which passed through the plaintiff's land, and for assessing certain lands, including the plaintiff's, therefor. The drain was commenced in 1866 and concluded. In 1873 they passed another by-law for widening and deepening this drain, which was accordingly done. In 1881 they constructed another drain, running into the first below the plaintiff's land. The first drain having become out of repair and choked up, the plaintiff's lands were to some extent flooded in the spring and autumn, and the water lay longer than if the drain had been of sufficient capacity to carry it off as it was brought on.

Held, affirming the judgment of Hagarty, C.J. (Cameron, J., dissenting), that the plaintiff was entitled to recover against the defendants for their breach of duty in not preserving, maintaining, and keeping the drain in repair under R. S. O. cap. 174, sec. 543, and that a mandamus should issue to compel the defendants to make the necessary repairs.

Per Cameron, J. An action is expressly given by section 542 of that Act for injury done by such neglect where the drain serves two municipalities, but in a case like the present, though a municipality may be compelled by mandamus to repair such a drain, no action lies for injury caused by non-repair merely on account of the duty imposed upon the municipality by sec. 543 to maintain, etc., the drain.

WHITE v. CURRIE.

Solicitor and client—Non-registration of mortgage—Negligence—Measure of damages.

The defendant, a solicitor, was retained by the plaintiff to prepare a mortgage upon real estate from one W. to the plaintiff, as security for liability incurred by the plaintiff for W. The mortgage was drawn, but the defendant omitted to register it for several years, and a second mortgage to one A. gained priority by being registered before it. The money advanced by A. upon the security of his mortgage, was used to pay off existing incumbrances on the property. There was a loss to the plaintiff on his mortgage.

Held, affirming the judgment of Galt, J., that the defendant was liable to the plaintiff for the breach of duty in not registering the mortgage, but that the plaintiff was entitled to nominal damages only, inasmuch as A.'s mortgage merely took the place of the existing encumbrances, to which the plaintiff's mortgage would otherwise have been subject.

Held, also, upon the evidence, Armour, J., dissenting, that there were no instructions to the defendant to include in the mortgage certain property called the Niagara Street property.

Per Armour, J. The evidence showed that such property was to have been included, and the defendant was liable for neglecting to include it to the extent of its value, \$2,000.

REGINA v. WALSH,

[CAMERON, J., 27TH FEBRUARY, 1883.]

Canada Temperance Act—Conviction—Hard labour—Proof of Act being in force—Jurisdiction of magistrate—Certiorari—Several offences.

The defendant was convicted of selling intoxicating liquor contrary to the Canada Temperance Act, 1878, upon an information charging him with keeping, selling, and bartering liquor. He was adjudged to pay a fine of \$50 and \$5.20 costs, and in default of payment and for want of sufficient distress he was adjudged to be imprisoned in the County gaol at hard labour. A second record of the conviction bearing the same date as the first was filed, differing in some minor points from the first and omitting the adjudication as to hard labour, and adjudging the payment of \$5.27 costs. The proceedings were removed by certiorari.

Held, that the first conviction was bad for want of jurisdiction to impose hard labour which is not authorized by the act; and that the second was bad in not following the actual adjudication as to costs, which were as shown by the magistrate's minutes in reality \$5.20 and not \$5.27.

The Canada Temperance Act does not, *per se*, make the selling of intoxicating liquor an offence. It is only so after the second part of the Act has been brought into force by the proceedings indicated for that purpose in the first part, which proceedings cannot be judicially noticed, but must be proved, and in the absence of such proof the magistrate acts without jurisdiction.

Held, therefore that the two convictions were bad for they did not show that the act of the defendant was unlawful by reason of the Canada Temperance Act being in force, and therefore the jurisdiction of the magistrate did not appear; and, his jurisdiction not appearing, the writ of certiorari had not issued improvidently.

Held, also that the convictions were open to objection on the ground that the information embraced more than one offence, and the magistrate having disregarded the express directions of the Act 32-33 Vict. cap. 31, made applicable by the Canada Temperance Act, might be said to have acted without jurisdiction.

Tizard, for the defendant.

Fenton, contra.

COMMON PLEAS DIVISION.

THE TOWNSHIP OF DUNDAS v. GILMOUR, *et al.*

*Third party—Trial of question between defendants and third party—
Delaying plaintiff—Rule 112.*

Held, under rule 112, where in an action the plaintiff is entitled to recover against the defendant against whom the action is brought, the defendant is precluded from trying questions arising between himself and a third party added at his instigation under rule 108, in the trial of which the plaintiff has no interest and which has the effect of delaying the plaintiff in his recovery.

E. Martin, Q. C., for the plaintiff,

Victor Robertson, for the defendant.

McCANN v. CHISHOLM.

Easement—Lateral Support—Action by tenant.

Held, that an action against the proprietor of land, for damages done to a building by removal of the lateral support afforded by the adjoining land, may be maintained by the tenant of the building.

Osler, Q. C., for the plaintiff.

Moss, Q. C., for the defendant.

DUFF v. THE CANADA MUTUAL FIRE INSURANCE CO.

Mutual Insurance Co.—Solicitor's Costs—Separate branches.

Held, *Osler, J.*, dissenting, that under the Mutual Insurance Act, R. S. O. cap. 161, a solicitor's remedy for costs, for services rendered to a Mutual Insurance Company, must be directed against the respective branches for which the services were in fact rendered; and in case of a deficiency of assets of any of the branches, the members of the other branches are not liable for the claims of the defaulting or insolvent branches.

Per *Osler, J.* A creditor of the Company, for a debt incurred as part of the necessary expenses of the Company, though in relation to the business of some branches only, is entitled to be paid out of the Company's moneys derived from assessments for losses and expenses on policy-holders in other branches.

Duff, for the plaintiff.

Laidlaw, for the Hydrant Branch.

Osler, Q. C., for the County Branch.

REGINA v. GOODMAN, *et al.*

Criminal law—Prisoner committed on one charge and tried on another—Consent.

The prisoners were committed for trial on a charge of gambling on a railway train. On the case coming before the County Judge, an indictment was preferred under 42 Vict. cap. 44, sec. 3, for obtaining money by false pretences. The prisoners' counsel objected to their being tried on a different charge from that on which they had been committed. The Judge over-ruled the objection, and on the charge being read over to the prisoners, and it being explained to them that they had the option of either being tried forthwith, or remaining untried until the next sittings of Oyer and Terminer and General Gaol Delivery, they pleaded not guilty and said they were ready for trial. The case then proceeded, and the prisoners' counsel cross-examined some of the Crown witnesses, and at the close of the case took several objections to the proceedings, but made no objection to the case having been tried without the prisoners' consent. A writ of *habeas corpus* having been issued and the discharge of the prisoners moved for,

Held, that the motion must be refused.

Per Wilson, C.J. It is unnecessary to decide whether the prisoners' remedy was by *habeas corpus* or by writ of error, because upon the facts they were not entitled to take either of these remedies.

Per Osler, J. The prisoners having been imprisoned under the conviction of a Court of record, an objection of error in the proceedings must be by writ of error; that the writ of *habeas corpus* was therefore improvidently issued, and should be quashed.

T. S. Jarvis, for the prisoners.

Delamere, for the Crown.

HILLOCK v. SUTTON.

Title by possession—Lease from original owner to person having possessory title—Effect of—Fraud—Setting aside lease.

The plaintiff acquired a title to certain lands by possession. The defendant, who had purchased the interest of the heirs of the original owner, and his solicitor, both being aware of the circumstances connected with the plaintiff's possession and title, represented to him that he had no title. The plaintiff, an illiterate man and unaware of the effect of his possession, was induced to accept a lease of the land from the defendant for two years at a nominal rent, with a covenant to yield up possession at the end of the term.

Held, under the circumstances, that the lease must be set aside; but even if allowed to stand it would not constitute an acknowledgment sufficient to displace the plaintiff's title, for its effect would be only to create an estoppel during its continuance.

Myers, for the plaintiff.

Osler, Q.C., for the defendant.

EMERSON v. NIAGARA NAVIGATION COMPANY.

Carriers by water—Refusal to pay fare—Assault by purser—Liability of defendants—Summary conviction—Bar to civil remedy.

The plaintiff who had purchased a special excursion ticket from Toronto to Niagara and return by a steamer of the defendants', good only for the day of its date, and which had been taken up by the purser on that day, claimed the right to return by it on the following day, under an alleged agreement with the purser which the latter denied. On the purser demanding the plaintiff's fare, and the latter refusing to pay it, the porter, by the purser's direction, laid hold of a valise which the plaintiff was carrying and attempted to take and hold it for the fare, whereupon a scuffle ensued, and the plaintiff was injured.

Held, Osler, J., dissenting, that the purser was not acting within the scope of his duty in thus forcibly attempting to take possession of the valise, and therefore that the defendants were not liable for his act.

It appeared that the purser had been summoned by the plaintiff before a magistrate, and was fined for the assault and that he had paid the fine.

Per Wilson, C.J. The imposition and payment of the fine was a bar to any further proceedings, either civil or criminal, for the same cause.

J. K. Kerr, Q.C., and W. Roaf, for the plaintiff.

Boulton, Q.C., for the defendants.

FIRE INSURANCE ASSOCIATION *et al.* v. CANADA F. & M. INS. CO.

Re-Insurance—Statutory conditions.

Upon the agreement stated in *Fire Ins. Ass'n. v. Canada F. & M. Ins. Co.*, ante. p. 200, between the plaintiff and defendant companies,

Held, that the statutory conditions are not applicable to a contract of re-insurance.

C. was insured in the Dominion Ins. Co., one of the plaintiff companies which re-insured in the defendant company for part. On a loss occurring the claim was paid by the Association, under their said agreement with their co-plaintiffs.

Held, that the plaintiffs were entitled to recover, or, treating the agreement as a re-insurance (though more properly a transfer of business with liabilities and collateral securities), if it was of the whole amount of the

Dominion Ins. Co.'s liability, the Association having paid the whole loss to the Company, or which was the same thing, to C., were entitled, irrespective of any assignment, to contribution from defendants; if, however, it was only of the residue of C.'s risk, the defendants were still liable to the Company on their policy, and by the very terms of the agreement it was effectively assigned to the Association who acquired all their co-plaintiffs' rights and interests in it.

Robinson, Q. C., and G. F. Harman, for the plaintiffs.

Osler, Q. C., for the defendants.

McDONALD v. MURRAY.

Sale of land—Agreement—Uncertainty—Action to recover instalment—Tender of conveyance—Title.

By an agreement in writing for the sale of lands for \$60,000, \$4,000 was to be paid on the execution of the agreement, \$40,795 within 60 days thereafter, and the balance was to remain on mortgage. The purchaser paid \$4,000, but at the expiration of the 60 days refused to pay the \$40,795, to recover which this action was brought.

Held, that the provision as to the mortgage did not render the agreement void for uncertainty, for it was a matter to be settled by the election of the purchaser at what time he desired the balance should be made payable.

Held, also that an action was maintainable to recover the \$40,795 before a conveyance of the land was made; that it was the purchaser's duty to prepare and tender the conveyance for execution; that it was unnecessary for the plaintiff to aver that he had a good title; that all he was required to do was to make a good title in a case in which he might be called upon to do so; that he could not be so called upon until the last instalment was demanded or the defendant showed a readiness or willingness to arrange that according to the terms of the contract.

A non-suit entered at the trial was set aside, and a new trial granted to enable a plea of fraud to be tried.

J. K. Kerr, Q. C., and Holman, for the plaintiff.

McMichael, Q. C., for the defendant.

[OSLER, J., MARCH, 1883.]

CUMMINGS v. LOW.

Reference—C. L. P. Act, sec. 189—Appeal.

An action for an account and delivery up of a trust estate was referred at the trial to the Master at Picton, by an order drawn up on reading the pleadings and hearing counsel; the Master to have all the powers of a Judge as to certifying and amending pleadings, etc., and to enquire and report as to the plaintiff's right to bring the action; the defendant to have the right to claim all such allowances for his care etc., as in the Master's opinion he should show himself entitled to; costs to be in the Master's discretion; and the whole report to be reviewed or appealed from, according to the statute in that behalf.

Held, a reference under sec. 189, of the C. L. P. Act; and that an appeal from the finding of the Master was therefore regularly set down under the provisions of that Act, to be heard by a single Judge in Court.

The form of the order of reference observed upon, and the ordinary and well-known terms of reference recommended to be followed.

McNee, for the plaintiff.

G. H. Watson, for the defendant.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 15TH FEBRUARY, 1883.]

CHURCH v. FULLER.

Specific performance—Dismissal of action—Costs between defendants—Discretion.

The plaintiff claimed specific performance of an alleged agreement to sell land. The defendant G. claimed under a prior registered conveyance from the vendor F., and the plaintiff's action was dismissed without costs. The defendant F., was ordered to pay G.'s costs. There was no issue between the defendants.

Held, affirming the judgment of the Chancellor, that the rule in England does not apply here, that the Court has jurisdiction to make such an order for costs if the circumstances warrant it, that it is a discretionary order, and that the discretion will not be interfered with.

McMahon v. Barnes, (not reported), Order Book, No. '9, fol. 730, followed.

Moss, Q.C., for defendant F.

MacLennan, Q.C., for defendant G.

BLACK v. STRICKLAND.

Bill of Exchange—Special endorsement—Discount—Satisfaction by drawer—Right of to negotiate.

W. drew a bill of exchange payable to his own order on the defendants, who accepted it. W. endorsed it and discounted it at the Bank of Ottawa, who at the time placed over W.'s endorsement "pay to the order of the Bank of Ottawa." That bank endorsed it to the Canadian Bank of Commerce at Peterborough for collection; not having been paid, the bill was returned to the Bank of Ottawa, and the plaintiff, as W.'s agent, received it from that bank with other of W.'s papers, and sent it to W. at Winnipeg, who endorsed it specially to the plaintiff. When it was returned from Winnipeg it appeared as it did at the trial, with the special endorsements struck out, bearing only the signature of W. below the place where the special endorsement had been, and the special endorsement to the plaintiff. The plaintiff was nonsuited on the objection that he was not the lawful holder, by reason of there being no re-endorsement by the Bank of Ottawa to W.

Held, that the nonsuit was wrong, for upon the bill being returned to W.'s agent by the Bank of Ottawa, W. was entitled to his original rights as against the acceptor; for it must be inferred that W. had satisfied the bank, and thereby acquired the right to cancel the previous special endorsements which had become inoperative, their objects having been satisfied.

Wells, for the plaintiff.

S. H. Blake, Q.C., for the defendants.

[THE CHANCELLOR, 14TH FEBRUARY, 1883.]

In re KIRKPATRICK; KIRKPATRICK v. STEVENSON.

Legacy—Residue—Statute of Limitations.

A legacy, though not payable out of land, and though it be of a residue, is barred after ten years under R. S. O. cap. 108, sec. 23, and the right to receive the same ordinarily accrues at the end of one year from the testator's death.

Two executors were entitled in equal shares to a residue. By arrangement between them the acting executor got in all the assets, and by agreement he was to divide with his co-executor, and remit to him a moiety when the sums collected amounted to a certain aggregate. From time to time the fund in the hands of the acting executor was resorted to for the purpose of making good deficiencies in the general legacies.

Held, that the executor claiming the share was entitled to recover his moiety in respect of all sums received by the acting executor within ten years from the time of making his claim therefor, but was barred as to all sums received before that period, and that the case was not taken out of the operation of the statute because the residue was not precisely ascertained, on account of its being from time to time reduced by payment of general legacies thereout.

Held, also, that the acting executor became the debtor of his co-executor by the receipt of the moneys, and could not be held to be a trustee for him, notwithstanding the agreement above mentioned.

McCarthy, Q.C., and *Plumb*, for the claiming executor.

MacLennan, Q.C., contra.

[14TH MARCH, 1883.]

THE BOYS' HOME v. LEWIS.

Will, construction of—Devise to trustees beneficially—Compensation where trustees take legacies—Interest on residue.

A testator devised a parcel of land to "his trusty friends J. L. and R. M.," in trust for an adopted son who died under age, whereupon the land fell into the residue. The residue was given to "J. L. and R. M., or the survivor of them," and the expression "my trustees or the survivor" was several times repeated. In speaking of the residue, the testator used formal legal expressions referring to the duties of the trustees.

Held, affirming the ruling of the Master, that the trustees took as a class and not as individuals.

Held, also, that the fact that they were beneficially interested in the residue, did not disentitle them to compensation for administering the estate, especially as the amount of the residue was a matter of extreme uncertainty, and largely accrued from the deaths of beneficiaries after the testator's death.

Held, also, that they were not entitled to a percentage on that part of the residue retained by them under the residuary clause.

Held, also, that they were chargeable with interest on the residue after the time at which it became distributable.

[14TH MARCH, 1883.]

SCANE v. DUCKETT.

Action for solicitors' costs—Delivery of bill—Creditors' suits—Pleading—Demurrer.

Claim: That the defendant D., being indebted to the plaintiffs, a firm of solicitors, for professional services, a bill of the costs of which the plaintiffs had "duly delivered," made a conveyance of land to the defendant W., purporting to be for value, but in reality without consideration; that D. had no other property out of which the plaintiffs could be paid. Demurrer thereto.

Held, (i) that the omission of the plaintiffs to allege that they sued on behalf of all other creditors, did not form the subject of a demurrer for want of equity, the averment being a formal one; the objection should be dealt with under Rules 103, 104, and should probably have been taken as soon as the writ had been served. (ii) That the omission to allege that a month had elapsed since the delivery of the bill did not make the claim demurrable, but the fact that a month has not so elapsed before action must be set up as a ground of defence, unless it appears on the face of the claim that a month has not elapsed. (iii) That, though it was not in terms alleged that the conveyance had been made with intent to defraud, the facts alleged sufficiently led to that inference.

[MARCH, 1883.]

BRECKENRIDGE v. ONTARIO LOAN & DEPOSIT CO.

Settling minutes of judgment—Disagreement of parties—Reference to Judgment Clerk.

Held, that where the parties cannot agree upon the minutes of a judgment before a Local Registrar, a direction should be obtained on motion to a Judge, to refer the minutes for settlement to one of the Judgment Clerks, pursuant to Rule 416.

S. H. Blake, Q.C., for the plaintiff.

Hoyles, for the defendant.

H. C.

[FERGUSON, J., FEBRUARY, 1883.]

MCLEOD v. MCLEOD.

Infant defendant—Costs out of share.

W. McLeod devised lands to his widow for life, remainder in fee simple to his son Donald, subject to legacies. Two months before his father's death Donald obtained a deed from his father of the land, in consideration of the maintenance of his father and mother for their lives.

Donald having died, the defendant McL., a creditor, administered, and the lands were sold by order of the Court to the defendant McD., and the proceeds paid into Court. In this action, which was against J. M. McLeod and N. McLeod, widow and infant son, respectively of Donald, and McL. and McD., the deed from W. McLeod to his son Donald was attacked as having been obtained by undue influence, and it was sought to establish the will of W. McLeod. At the trial the sale to McD. was allowed to stand, the will was established, and the legacies and provision made for the testator's widow, and the plaintiff's costs of suit, were directed to be satisfied out of the proceeds of the sale in Court. On settling the minutes of the judgment the Registrar refused to provide for payment of the costs out of the moneys in Court, on the ground that the infant defendant, who was entitled to the balance of the purchase money after payment of the legacies, &c., and his father's debts, would thus be charged with all the costs. The minutes were spoken to.

Held, that the costs of suit of the plaintiff, the infant defendant, and the defendants, McL. and McD., should be directed to be paid out of the purchase money in Court.

S. H. Blake, Q.C., and McPhillips, for the plaintiffs.

J. H. Macdonald, for the defendant McD.

D. J. McIntyre, for the defendants J. M. McLeod and McL.

Plumb, for the infant defendant.

H.C.

[7TH MARCH, 1883.]

HUGHES v. REES *et al.*

Private international law—Marriage of person domiciled in Quebec—Community of property—Covenant in favour of wife made in Ontario—Estoppel—Declaration of trust—Support and maintenance of wife—Lis alibi pendens.

The defendant, D. J. R., who was domiciled in Quebec, married at Toronto the defendant, A. M. R., who, at the time, received from her father \$4,000 in ready money, and afterwards the sums of \$4,000 and \$2,000, which were laid out in the purchase of stock of the Ontario Bank, (having its head office in Ontario) which was transferred to her husband D. J. R., in trust. There was no ante-nuptial settlement. The parties immediately went to reside in Montreal, where they continued until, owing to domestic differences, A. M. R. returned to Toronto. While there D. J. R. went to Toronto, and an instrument was drawn and executed on 3rd March, 1875, between A. M. R., the plaintiff, and the defendant D. J. R., whereby the parties covenanted with each other that the Bank Stock

should be transferred to the plaintiff and D. J. R., and the \$4,000 of money should be held by the same parties in trust to invest the money, and to pay the income to A. M. R. for life, and after her death to the children of D. J. R. and A. M. R. D. J. R. then gave his promissory note for the money to the plaintiff, and, two years afterwards, he transferred the Bank stock in Montreal to the plaintiff and himself. The plaintiff had made certain advances to the defendant A. M. R. (expecting to be re-paid out of the trust moneys), to defray her expenses of a pilgrimage to Rome. The suit was brought to remove D. J. R. from the alleged trust, and appoint a new trustee. There was an action pending in Quebec for the recovery of the advances.

Held, upon the evidence given as to the law of Quebec, (i) that the defendant, D. J. R., having been domiciled in Quebec at the time of the marriage, and no ante-nuptial settlement having been made, the money given to A. M. R. at and after the marriage fell into the community, and by the law of Quebec her husband could not make a gift thereof to his wife. (ii) That, though the Bank Stock being situate in Ontario might have been transferred to the wife by a completed instrument made in, and valid according to the law of Ontario, it did not pass under the instrument in question, which was only a covenant to transfer, and that the transfer of the stock made subsequently in Montreal by D. J. R., was void by the law of Quebec. (iii) That a gift might, by the law of Quebec, have been validly made to the children if properly accepted for them; nothing passed to them by the deed, for it was not a complete gift but a promise only, and, therefore, there could not have been, and there was not in fact, a good acceptance for the children; and therefore the deed was void and passed neither the stock nor the money.

Held, also, that the covenant in the deed could not be specifically enforced; and that it could not be supported as a declaration of trust, which was not at the time recognized by the law of Quebec; nor could it operate to give the trustees a title by estoppel.

Held, however, that the plaintiff was entitled to a reference to the Master to enquire and state whether he had any claim against the defendant D. J. R. for support and maintenance of his wife and children alleged to have taken place while the trusts in the deed were supposed to have been valid, and that the fact that an action was pending in the Province of Quebec for the same cause was not a sufficient answer to this claim.

S. H. Blake, Q.C., and Geo. Morphy, for the plaintiff.

MacLennan, Q.C., and Kingsford, for D. J. R.

Donovan, for A. M. R.

Moss, Q.C., for the infant defendants.

IN CHAMBERS.

MILNER v. CLARK: THE GRAND TRUNK RAILWAY CO., *Cited*.*Examination of parties—Officer of Railway Company—Station Master.*

The plaintiffs sued the defendants for the price of a car load of corn, f.o.b. at Chatham, which was delivered to the parties cited to be carried to the defendants at Toronto, and which the defendants refused to accept on its arrival, on account of its being wet and heated. The defendants cited the Railway Company, who appeared, and they claimed that, if the plaintiff had delivered the corn to the company in good order and condition, as he alleged, then the Railway Company by their negligence in not providing a proper car injured it. The station master at Chatham, at the time of their application, was the freight agent at that place when the corn was shipped. The usual *ex parte* order for his examination were made on the application of the defendants.

Ogden moved to rescind the order on the ground that a station master was not an officer of the company within the meaning of the Common Law Procedure Act. He cited *Dalsiel v. G. T. R. Co.*, 6 P. R. 307; *McLean v. G. W. R. Co.*, 7 P. R. 358.

E. Douglas Armour, contra. The station master is the officer of the company who is specially authorized by the company to make shipping contracts for the company, and he has a discretionary authority to act for the company at the place where he is situated. He is the only person who has or had immediate access to the knowledge which may be useful to the defendants; *Consolidated Bank v. Neilon*, 7 P. R. 251.

Osler, J., March, 1883.—The motion must be refused with costs, to be costs in the cause to the defendants against the Grand Trunk Railway Company. I think the station master is an officer of the Company for the purpose of examination.

[GALT, J., 27TH FEBRUARY, 1883.]

HANDS v. NOBLE.

Division Courts Act, 1880—Transfer of cause—Prohibition.

An action for \$129, under the Division Courts Act, 1880, upon a note payable at Sault Ste. Marie, Michigan, U. S. A., was brought in the 1st Division Court, York. On the 4th December, 1882, an order was made on the application of the plaintiff, transferring the action to the 8th Division Court, Simcoe.

Held, that a prohibition should issue to the latter Court; for a cause can be transferred under sections 9 and 11 of the Division Courts Act, 1880,

only when it has been entered in the wrong Court by mistake or inadvertence, neither of which facts appeared here, and the order of transfer can only be made on the application of a defendant.

Gould, for the motion.

H. W. M. Murray, contra.

(Reported by C. R. Gould, Esquire, Barrister-at-Law.)

[THE MASTER IN CHAMBERS, 7TH MARCH, 1883.
GUELPH CARRIAGE GOODS CO. v. WHITEHEAD.

Production of documents—Discovery.

In an action for the infringement of a patent of invention, the defendant pleaded want of novelty and existence of prior patents for the same invention in the United States, but gave no particulars as to names of States, dates, etc. On his preliminary examination the defendant admitted that he, through his solicitor, had obtained copies of certain patents relating to the matters in question in the action.

Held, that they were privileged, having been obtained during the progress of the action for the purposes thereof, and that their production could not be enforced.

H. Cassels, for the plaintiff.

Hoyles, contra.

H. C.

WILSON v. COWAN.

[9TH MARCH, 1883.

Examination of parties—Subpœna and appointment—Notice of examination.

On a motion to strike out the defence on account of the non-attendance of the defendants for examination pursuant to subpœna and appointment, it appeared that the subpœna had been issued three days before the appointment was made by the special examiner, though after the right to examine the defendant had accrued, and that the defendants had not received 48 hours' notice of the examination, though the notice given was sufficient notice to enable them to attend at the time and place appointed. Their solicitors received 48 hours' notice.

Held, that the subpœna and the service of the appointment and subpœna were sufficient.

Langton, for the plaintiffs.

H. Cassels, for the defendants.

H. C.

TAXING OFFICE.

[29TH JANUARY, 1883.]

CLARK v. AUGER.

Substitutional service—Service by mailing—Jurisdiction of Local Master.

This was an action on a mortgage.

The defendant, who had resided and carried on business in the County of Kent, absconded, leaving his wife residing in the same county. The plaintiff's solicitors practised in the same county, and, on their application, the Local Master at Chatham, proceeding under Rule 422 (a), made an order for substitutional service on the defendant by serving his wife, and by mailing copies of the writ to several villages at which the defendant had stayed before leaving the Province. The wife had had no communication with the defendant, and was not aware of his whereabouts. Judgment was signed on default of appearance, and the costs were taxed and sent to this office for revision. Mr. Thom, taxing officer, called the attention of the Judges of the Chancery Division to the facts, who

Held, that the Local Master had no jurisdiction to make the order, and that the service made thereunder was nugatory.

H. C.

SMITH v. DUNN.*Judicial sale—Ten per cent. payable to vendor's solicitor—Delay in paying same into Court—Liability for interest.*

Upon a sale under a judgment of the Court on the 17th January, the purchaser was required by the conditions to pay to the vendor's solicitor a deposit of ten per cent. of the purchase money on the day of sale, and to pay the balance into Court within one month thereafter. He paid the deposit to the vendor's solicitor, and on 9th February his solicitor attended at the accountant's office for a direction to pay the balance into Court. The accountant refused the direction, as the judgment authorizing the sale had not been left with him, and no account was opened in the books. The vendor's solicitor was thereupon notified, and promised to pay in the deposit. The purchaser's solicitor attended again on the 21st February, but the accountant had not received the judgment, nor had any account been opened, and he refused a direction. On the 23rd February the vendor's solicitor paid in the deposit, and left the judgment with the accountant, and on the same day the purchaser's solicitor paid in the balance of the purchase money.

H. Cassels, for the purchaser, now applied for a vesting order, and for an order directing the vendor's solicitor to pay into Court the interest which had accrued upon the purchase money, owing to the money not having been paid into Court at the proper time. He contended that it was the duty of the vendor's solicitor, under General Order 385, to have paid the deposit into Court forthwith, and that, had he done so, there would have been no obstacle in the way of the purchaser when applying to pay in the balance.

Gwynne (Bethune, Moss, Falconbridge & Hoyles), contra.

John Winchester, Official Referee, directed the vendor's solicitor to pay the interest into Court as asked.

H. C.

NEW BRUNSWICK.

In the Supreme Court.

Ex parte BOYNE.

Canada Temperance Act, 1878—Election under—Scrutiny—Parties to—Prohibition.

By the return of a poll held on a petition to bring the Canada Temperance Act (41 Vict. cap. 16) into operation, it appeared that the votes for and against the petition were equal. An application to the Judge of the County Court under section 61 of the Act, praying for a scrutiny of the votes polled, charged that there had been bribery and treating; that persons who had no right to vote voted against the petition by personating voters; that ballots against the petition were improperly allowed, and ballots in favour of it improperly rejected by the returning officers; and that there was a legal majority in favour of the petition; that B. was the secretary of a committee who opposed the petition, and that F. was prominent at the election in opposing it, and was a proper person against whom the petition might be brought. The Judge thereupon appointed a time for hearing the application, and directed notice to be given to B., F. and S., and at the hearing, decided that B. and F. were proper parties against whom the petition should be brought, and ordered the petitioners to enter into a recognizance to prosecute the petition, and to pay B. and F. any costs that might be adjudged them; and appointed a day for the scrutiny.

Held, per Allen, C. J., Palmer and King, JJ. (Weldon, J., dissenting), that the Judge of the County Court had jurisdiction over the subject matter of the petition, and power to name a party against whom the same should be brought; that F. was properly named as such party, and therefore the recognizance was sufficient, even if B. should not have been included; but,

Semble, that B. was also properly named as a party.

Held, also, that as the petition contained sufficient allegations to authorize the Judge to proceed, it was immaterial that it asked for the scrutiny on other grounds into which he might not have a right to inquire.

Per Weldon, J. 1. The petition should have been brought against the officer whose return was complained of, or against the agent of a party at the polling. 2. The petition stated no act done by B. to justify his being made a party. 3. The authority of the County Court Judge was only to order a recount of the ballots; and as the petition asked for a scrutiny of the votes polled on other grounds, not authorized by the Act, the Judge had no jurisdiction, and a prohibition should issue to restrain him from proceeding.

[AUGUST, 1882.]

BROWN, APPELLANT, v. VAUGHAN, *et al.*, RESPONDENTS.

Ship—Master—Wages of—How recovered—Registered owner—Liability for wages—Appeal—Practice.

R. B., plaintiff's brother, having a vessel, partly built, entered into an agreement with the defendant, by which the latter was to supply a certain amount to complete her. The agreement provided that the vessel when completed should be registered in defendant's name as security; that R. B. should take her to Liverpool on his own account and pay all disbursements, for which defendant was to advance R. B. a further sum. She was to be sold at Liverpool, the defendant paid, and the balance given to R. B.

Under this agreement, R. B. finished the vessel, and she was registered in the name of the defendants. R. B. employed plaintiff as captain, without any other authority from defendant to do so, and he did not interfere. The vessel proceeded to Liverpool under the directions of R. B., he going in the ship himself; but instead of selling her and paying defendant, he chartered the vessel and came out to America, against defendant's protest, and on her voyage back to Europe she was wrecked and put into Nassau, abandoned the voyage, and went from thence to Pictou for repair, where R. B. discharged plaintiff and settled with him, a balance of £32 2s. 8d. sterling being found due plaintiff for wages, for which this action was brought. On the trial, which took place in the County Court of Kent, it was proved that defendant resided at St. John (being more than twenty miles from Pictou), at the time of plaintiff's discharge and ever since.

The County Court Judge left the case to the jury, who found a verdict for the plaintiff, but the Judge afterwards nonsuited him on the ground that by the 56th section of "The Seaman's Act, 1873," the Court had no jurisdiction to try the case.

Held, that the County Court clearly had jurisdiction, and the Judge was wrong in ordering a nonsuit on this ground; but

Held, by Allen, C. J., and Palmer and King, JJ., that, under the facts proved, R. B. and not the defendant was liable for plaintiff's wages, and the nonsuit was upheld on this ground;

And also, that it was open to the respondent, in order to support the judgment of the Court appealed from, to avail himself of other grounds than those on which it was decided below.

Held, by Weldon, J., that there was evidence of defendant's liability to go to the jury, and there should be a new trial.

By Wetmore, J., that there was evidence of defendant's liability to go to the jury, and that the verdict should be restored.

GREENE v. THE ST. JOHN & MAINE RAILWAY CO.

Railway Company—Freight—Reasonable charge—Common carriers—Implied promise—Action to recover back excessive charges.

By Act 27 Vict. cap. 43 (N. S.), and 41 Vict. cap. 91 (N. S.), the Legislature gave power to the defendant company to construct and maintain a railway from St. John to the Maine boundary for the purpose of transportation of persons, goods and property of all descriptions, giving them all powers and privileges necessary to carry into effect such purposes and objects, and empowering them to purchase and hold engines, cars, and other necessary things for the transportation of persons, goods and property of all descriptions, and granting to them a toll upon all passengers and property of all descriptions, which might be conveyed or transported by them upon such road, at such rate as might be established from time to time by the directors of the company. Defendants having their line of railway in operation, plaintiff's builder at St. John delivered to them for transportation six platform cars. Nothing was said about the rate of freight previous to the six cars being carried, and no rate of transportation had been established by the directors for such description of property. Defendants refused to deliver the cars unless the plaintiff paid at the rate of \$23 a car, which he did under protest. Afterwards the builder at St. John sent seventeen more cars to the defendants' line, and they were by them received and transported in the same manner, nothing being said about the rate of freight. The like sum of \$23 a car was demanded before

delivery and paid under protest, and plaintiff thereupon brought action to recover the amount paid in excess of a reasonable charge.

Held, 1. That *prima facie* and in the absence of proof of a more limited profession, the defendants must be taken to hold themselves out as carriers of all descriptions of property capable of being reasonably and conveniently transported over rails by a locomotive engine, to the extent to which they have the means and accommodation for such traffic. 2. That as to the six cars first sent, the defendants were entitled only to a reasonable compensation, as there was no established toll and no special agreement. 3. As to the remaining seventeen cars, that the defendants were bound to transport them for a reasonable remuneration at least in the absence of a rate of freight established according to statute; that there was no implied promise on plaintiff's part to pay the same freight as on the six cars previously sent, the proper inference to be drawn from the transaction being, that plaintiff relied on his right to have the goods carried at such rate as the law should declare to be the proper rate.

[NOVEMBER, 1882.]

In re JOHN DRURY'S WILL.

Will—Cutting off seal—Execution of new will—Invalid by reason of improper attestation—Dependent relative revocation.

Deceased, having duly executed a will in 1874, and the will having been found amongst his papers at his death in 1881, in a mutilated state, along with another insufficiently executed will, the two questions arising in this case were first, whether the mutilation amounted to a tearing or other destruction of the will within the meaning of the Wills Act, and if so, whether it was done by the testator and with the intention of revoking the will. The facts proved before the Judge of Probates bearing on the act of mutilation were these: The testator, at the time of executing the will, affixed his seal to it in the presence of the attesting witnesses, but the instrument was not expressed to be under seal, nor did the attestation clause refer to the sealing of it. After the testator's death, the will was found with the seal cut out, leaving a hole in the paper where the seal had been; several pencil marks were also drawn through the signature.

The facts bearing on the question of the testator's intention in mutilating the will were as follows:—Deceased, who was a deaf mute, made his will when he was sick in 1874. In this will he left the bulk of his property to his eldest brother, C., and in case of C.'s death, to another brother, appointing the last named to be the executor of the will. Upon the death of the elder brother in 1880, the testator became very much dissatisfied, apparently because he thought that he should exercise more control as the oldest surviving member of the family. The testator, in conversation with one of the witnesses to the last will, referred to the first will (the one in

question), as having been obtained from him by false pretences, and as having been executed by him under circumstances which he dwelt upon as showing that he never intended to make such a will.

Held, by Palmer and King, JJ. (Weldon, J., dissenting), that the inference could not fairly be drawn that the testator meant the revocation of his will to depend upon the efficiency of the new disposition, or that he meant to revoke this will simply because he had, as he thought, made another in its place, and that there was a tearing of the will within the meaning of the Wills Act, with the intention of revoking the will, and not merely a dependent relative revocation.

JONES v. MILLIKEN.

Attorneys—Firm of—Whether each member must pay library fees—Notice of bail by firm when one in default—Irregularity.

Where two or more attorneys practice as partners, they must all be qualified by payment of library fees under Con. Stat. cap. 34, or their proceedings will be liable to be set aside.

Where special bail was put in, and the notice of bail was signed by a firm of attorneys, one of whom had not paid his library fees,

Held, by Allen, C.J., and Weldon, Wetmore, and Palmer, JJ., that the notice was not a nullity but an irregularity, and plaintiff's proper course was to have taken advantage of the irregularity by opposing the justification, or by applying to set the proceedings aside; but by King, J., that the notice was a nullity, and plaintiff was entitled to treat it as no bail, and take an assignment of the bail-bond.

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ERRATA.

Page 39. bottom line—For " disproved " read " " disputed."

Page 207, line 18—For " fine was a bar " read " fine was not a bar."

... upon which they are founded, stating these principles and rules in so far as is practicable in the very words of the judges who have formulated them.

It is worthy of remark that the Common Law judges now describe the doctrine of estoppel by negligence, or estoppel *in pais*, as an equitable doctrine, while the Chancery judges more than hint that it was an invention of the early Common Law judges whereby they hoped in some measure to snatch power from the Court of Chancery and appropriate it to their own uses without calling the borrowed doctrine by the hated name of Equity.

(a) See 3 C. L. T. 1.

Harrison, C. J., says as to the origin of the doctrine, "The real ground on which a person is precluded from proving that his representation, on which another acted to his prejudice, is false, is that to permit it would be inequitable. This is the reason that estoppel *in pais* is sometimes described as an equitable estoppel. The jurisdiction of enforcing this equity originally belonged to Courts of Equity; and does not appear to have been familiarly recognized at law until within a comparatively recent date; but now it is, with some exceptions, unnecessary to be mentioned, in its application common alike to Courts of Law and Equity" (b).

On the other hand Bacon V.C., gives the origin thus: "The Common Law doctrine of estoppel was, as I have said, a device which the Common Law Courts resorted to at a very early period to strengthen and lengthen their arm, and not venturing to exercise an equitable jurisdiction over the subject before them, they did convert their own special pleading tactics into an instrument by which they could obtain an end which the Court of Chancery without any foreign assistance did at all times, and I hope will at all times put into force in order to do justice. But the doctrine of estoppel is purely legal" (c).

The principle underlying the system is apparently common to most systems of jurisprudence. Lord Chancellor Campbell, in *Cairncross v. Lorimer* (d) says

"The doctrine will apply which is to be found I believe in the laws of all civilized nations, that if a man either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been done without his consent, and he thereby induces others to do that from which they might otherwise have abstained—he cannot question the legality of the act he has so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct."

(b) *McArthur v. Eagleson*, 43 U. C. R. 416.

(c) *Keate v. Phillips*, 18 Chy. D. 577.

(d) 2 Macq. 829.

A kindred doctrine was early enunciated by Ashurst, J., in *Lickbarrow v. Mason* (e), where he says, "We may lay it down as a broad general principle that whenever one of two innocent parties must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it."

The same thing has been more pithily put, that he who trusts most must suffer most.

The doctrine of Equitable Estoppel is frequently referred to as the rule in *Pickard v. Sears* (f) from the fact that that was one of the earliest cases in which the doctrine was formulated into a rule. Parke, B., in *Freeman v. Cooke* (g), states the rule and explains it thus:—"That rule is that where one, by his words or conduct, *wilfully* causes another to believe in the existence of a certain state of things, and induces him to act in that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the time. That was founded on previous authorities in the cases *Graves v. Key*, 3 B. & A. 313, *Hearne v. Rogers* 9 B. & C. 586; and has been acted upon in some cases since. The principle is stated more broadly by Lord Denman, in the case of *Gregg v. Wells* 9 A. & E. 97, where his Lordship says, that a party who *negligently* or *culpably* stands by and allows another to contract on the faith of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving. Whether that rule has been correctly acted upon by the jury in all the reported cases in which it has been applied is not now the question; but the proposition contained in the rule itself as above laid down in *Pickard v. Sears*, must be considered as established. By the term 'wilfully,' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he *means* his represen-

(e) 2 T. R. 70. The same rule was laid down in *Phillips v. im Thurn*, L. R. 1 C. P. 472, and in *Ex. p. Swan*, 7 C. B. (N. S.) 440.

(f) 6 Ad. & E. 469.

(g) 2 Ex. 663.

tation to be acted upon, and that it is acted upon accordingly : and if, whatever a man's real intentions may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth ; and conduct, by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect."

The same rule was further explained by Pollock, C. B., in *Cornish v. Abington* (*h*), when he says :

"Lord Wensleydale, in *Freeman v. Cooke*, commenting on the earlier case of *Pickard v. Sears*, pointed out a limitation of the application of the rule, viz., that 'in most cases to which the doctrine in *Pickard v. Sears* is to be applied the representation is such as to amount to the contract or license of the party making it.' No doubt, unless the representation amounts to an agreement or license, or is understood by the party to whom it is made as amounting to that, the rule would not apply ; but although the case of *Freeman v. Cooke* limited the application of the rule to this extent, the Court pointed out that the word '*wilfully*,' in the rule as laid down in *Pickard v. Sears*, means nothing more than '*voluntarily*.' Lord Wensleydale, perceiving that the word '*wilfully*' might be read as opposed not merely to '*involuntarily*' but to '*unintentionally*,' showed that if the representation was made voluntarily, though the effect on the mind of the hearer was produced unintentionally, the same result would follow. If a party uses language which, in the ordinary course of business and the general sense in which words are understood, conveys a certain meaning, he cannot afterwards say he is not bound, if another so understanding it, has acted upon it. If any person, by a course of conduct, or by actual expressions, so conducts himself that another may reasonably infer the existence of an agreement or license, whether the party intends that he should

(*h*) 4 H. & N. 555.

do so or not, it has the effect that the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct."

There seems to be a difference of opinion among the Judges as to the correctness of the above cited opinion of Lord Wensleydale, that "in most cases to which the doctrine in *Pickard v. Sears* is to be applied, the representation is such as to amount to the contract or license of the party making it." The same view was apparently entertained by Lord Cranworth, L.C. (i), while Lord Selborne, L.C., says, "I apprehend that nothing can be more certain than this, that the doctrine of equitable estoppel by representation is a wholly different thing from contract, or equitable assignment, or anything of that sort" (j).

Speaking of the nature of the conduct or representations which will operate as estoppels, Burton J. A., in *Walker v. Hyman* (k), says :

"In all the reported decisions it will, I think, be found that in order to bring a case within the principles laid down in *Freeman v. Cooke*, 2 Ex. 654, two things must concur: the party must so conduct himself that a reasonable man would consider it in the light of a representation, and believe that it was meant that he should act upon it; and the party for or to whom it was made must have acted on it as true;" and in *Mason v. Bickle* (l) the same learned judge adds :

"It would be very difficult to carry on the ordinary transactions of life if parties were to be held bound by statements made to persons with whom they were dealing directly, so as to render them responsible for every act that might be built upon them by strangers; it is very different when the declaration is made in such general terms or under such circumstances as to indicate that it was intended to reach or influence a third person."

(i) *Jordan v. Money*, 5 H. L. C. 214.

(j) *Citizens' Bank of Louisiana v. First National Bank of New Orleans*, L. R. 6 E. & I. App. 360.

(k) 1 App. R 352.

(l) 2 App. R. 302.

“In all the cases decided on this principle, in order that a party shall be estopped from denying his assent to an act prejudicial to his rights, and which he might have resisted, but has suffered to be done, it is essential that knowledge of the thing done shall be brought home to him. * * * It would be to carry this doctrine much too far to apply it where advantage has been taken of a man's remissness in looking after his own interests to invade or encroach upon his rights, in the absence of knowledge on his part of the thing done, from which his assent to it could reasonably be implied” (m).

There has been a conflict of opinion among the most able judges as to whether an estoppel may be worked by a *representation of an intention merely* or whether a representation in order to work an estoppel must be a *representation of an existing fact*. The weight of authority appears to have settled the question in favor of the latter proposition. Lord Cranworth, L.C., in *Jordan v. Money* (n), says:—

“I think that that doctrine does not apply to a case where the representation is not a representation of a fact but a statement of something which the party intends or does not intend to do. In the former case it is a contract, in the latter it is not.” This view was concurred in by Lord Brougham, and the judgment of the Court as expressed in the head-note was that “where a person possesses a legal right a Court of Equity will not interfere to restrain him from enforcing it, though, between the time of its creation and that of his attempt to enforce it he has made representations of his intention to abandon it. Nor will Equity interfere even though the parties to whom these representations were made, have acted on them and have in full belief in them, entered into irrevocable engagements. To raise an equity in such a case there must be a misrepresentation of existing facts and not of mere intention.”

Lord St. Leonards dissented from this view, holding that “it is immaterial whether there is a misrepresentation of

(m) Per Cockburn, C. J., in *Johnson v. Credit Lyonnais Co.*, 3 C. P. D. 40.

(n) 5 H. L. C. 214.

fact as it actually existed, or a misrepresentation of an intention to do or abstain from doing an act which would lead to the damage of the party whom you thereby induced to deal in marriage or in purchase, or in anything of that sort, on the faith of that representation" (o).

Lord Selborne, L. C., approves of the distinction drawn in *Jordan v. Money* between representations of fact and of intention, and agrees with the opinion of the majority of the Court in that case. Speaking of the doctrine in general and of this point in particular he says:—

"The foundation of that doctrine, which is a very important one, and certainly not one likely to be departed from, is this, that if a man dealing with another for value, makes statements to him as to existing facts, which being stated would affect the contract, and without reliance upon which, or without the statement of which, the party would not enter into the contract, and which being otherwise than as they were stated, would affect the contract, and without reliance upon which, or without the statement of which, the party would not enter into the contract, and which being otherwise than as they were stated, would leave the situation after the contract different from what it would have been if the representations had not been made; then the persons making those representations shall, so far as the powers of a Court of Equity extends, be treated as if the representations were true, and shall be compelled to make them good. But those must be representations concerning lasting facts" (p).

The representation whether by words or conduct according to Pollock, C. B. in *Raynell v. Lewis* (q) may be made directly to the plaintiff or made publicly so that it may be inferred to have reached him;" and Burton J.A. referring to this case says:

"I entirely agree that a declaration may be so general in its terms and made under such circumstances as to

(o) See remarks upon this case, 3 Davidson's Conv. 642 et seq.

(p) *Citizens' Bank of Louisiana v. First National Bank of New Orleans*, L. R. 6 E. & I. App. 360.

(q) 15 M. & W. 528.

indicate that it was intended to reach and influence the community at large, and in such cases this estoppel will be extended to every one who may be shown to have acted upon or been governed by it; but even, in such a case some evidence would have to be given from which a jury might infer that it came to the knowledge of the party and influenced him" (r).

Such representations to the public may be made by a person standing by and permitting third persons to deal with property in ignorance of his rights, therein. Thus where a wife for ten years concealed from the public her relation to her husband and allowed him to live with another woman as his wife under an assumed name, the real wife living in the neighborhood and receiving from them her own support, it was held that she was precluded from claiming dower out of land purchased during this period in her husband's assumed name and afterwards sold by him and his supposed wife to a purchaser who bought in good faith and without any notice of the real relationship of the parties (s).

Not only must a representation in order to work an estoppel be a representation of an existing fact as distinguished from a mere intention but it must also be a representation of a matter of fact as distinguished from a matter of law; thus where an intending purchaser of devised lands had some doubts whether the provision made by the testator for his widow was in lieu of dower, and asked the widow whether she had or claimed dower, it was held that even if her answer was in the negative it afforded no ground for the purchaser afterwards applying to a Court of Equity to restrain an action for dower brought by the widow on her being advised that under the terms of the will she was not put to her election, for her answer would merely mean that she claimed none because she had none, and this would be no more than an expression of opinion upon a matter of law, and a declaration of intention in

(r) *Walker v. Hyman*, 1 App. R. 351. See *Re Bahia and San Francisco Ry. Co.*, L. R. 3 Q. B. 585.

(s) *Hoig v. Gordon*, 17 Gr. 599.

accordance with it, a matter of law on which the intending purchaser was just as well qualified as the widow to form an opinion (t).

It is not necessary that there should be any fraud on the part of the person making the misrepresentation or that he should know that it is a misrepresentation, for it may well be that he himself is deceived and defrauded, and yet that he will be estopped by his innocent misrepresentation; thus when a railway company had been deceived into registering shares and granting certificates of registration whereby innocent persons were induced to purchase these shares under the belief that the vendors were registered shareholders, it was held that the company were estopped by their own act from denying the right of the innocent transferees of the shares to be registered as shareholders (u).

So also in *Jordan v. Money* (v) it is said by Lord Cranworth, L.C.:

“I think it not necessary that the party making the representation should know that it was false; no fraud need have been intended at the time. But if the party has unwillingly misled another, you must add that he has misled another under such circumstances that he had reasonable ground for supposing that the person whom he was misleading was to act upon what he was saying. It will not do if he merely said something, supposing it to be quite right, and then some stranger, having heard and acted upon it, should afterwards come to him to make it good.”

In order to work an estoppel the negligence or misrepresentation must be with respect to some person to whom the person estopped owes a duty.

Cockburn, C.J., in *Johnston v. Credit Lyonnais Co.* (w), says:—“The law is in my opinion correctly stated by Blackburn, J., in *Swan v. North British Australasian Company* (x),

(t) *Fairweather v. Archibald*, 15 Gr. 255.

(u) *Re Bahia and San Francisco Ry. Co.*, L. R. 3 Q. B. 584.

(v) 5 H. L. C. 212; and see *per* Pollock, C.B., in *Cornish v. Abington*, 4 H. & N. 555.

(w) 3 C. P. D. 42, 43.

(x) 2 H. & C. 181.

the interest to the mortgagees for about twelve years and, representing that the estate was his own and unincumbered, made an equitable mortgage of the estate to an innocent third person. It was held that the equitable mortgagee had priority over the original mortgagor.

It was contended on behalf of the original mortgagees that the conveyance in question was not merely voidable but was absolutely void, that no estate whatever passed to the solicitor and that therefore these mortgagees were not estopped by matter arising *ex post facto*, such as allowing the solicitor to retain possession of the deed and of the property. The Court while admitting the proposition of law would not admit that the case was one which called for its application. Lord Hatherly, L.C., says, "I apprehend that if a man executes a solemn instrument by which he conveys an interest, and if he signs on the back a receipt for money—a document which, as the Vice-Chancellor observes, could not be mistaken—he cannot affect not to know what he was doing, and it is not enough for him afterwards to say that he thought it was only a form. That merely amounts to saying that a misrepresentation was made to him, under which he executed a deed; still the deed may have been exactly what he intended to execute, though he intended it to be used for a totally different purpose. But this does not affect the deed. The fraud of the person who used the deed for a different purpose does not make it less the deed of the person who executed it" (e).

Sir W. M. James, L.J., in the same case says, "To my mind it is almost ludicrous to contend, and it would be most injurious to hold, that a man executing a deed and signing a receipt as a matter of form, should be able to say that it is a nullity. Many young men put their names to pieces of paper upon the representation that it is a mere matter of form, and that they will never hear any more of it. They learn by experience that the form is a painful substance. Many a trustee has endeavoured in vain in this court to escape from the consequences of his acts, by say-

(e) L. R. 7 Chy. App. 82.

ing, 'I signed a deed and I signed a receipt for money as a matter of conformity'; which is another mode of saying, 'I executed it as a matter of form.' But those trustees have been made most painfully to learn that the instrument they have so signed will, with the consequences, follow them, and cause them to suffer for their negligence" (f).

In the same case Sir George Mellish, L.J., says, "In my opinion it is still a doubtful question at law, on which I do not wish to give any decisive opinion, whether, if there be a false representation respecting the contents of a deed, a person who is an educated person, and who might, by very simple means, have satisfied himself as to what the contents of the deed really were, may not, by executing it negligently be estopped as between himself and a person who innocently acts upon the faith of the deed being valid and who accepts an estate under it. I do not think that the case of *Swan v. North British Australasian Company* (g) a decision of which the learned Vice-Chancellor disapproves—is really a direct authority upon that question, because in that case a transfer of shares had been executed in blank; the person who executed it owned shares in two companies, and gave authority to the broker to fill them up with shares in one company, and the broker filled them up with shares in another company, which were afterwards transferred to an innocent person. There the Court said that the whole thing was a forgery, and that the negligence of the transferor in executing the deed in blank was not the real and proximate cause of the loss, which was the forgery of the broker in filling the deeds up with shares differing from those which he was authorised to fill them up with. That decision does not go to the extent of saying that if the broker had filled them up with the same shares which he was authorised to insert, and therefore had done what he was authorised to do, that then, because it was void at law from being executed in blank, nevertheless the principal might not have been estopped. Some of the Judges

(f) L. R. 7 Chy. App. 84.

(g) 7 H. & N. 603.

expressed an opinion that in no case where a deed is void in that way could there be an estoppel; but no conclusive opinion was given on that point, and I do not think it necessary for me in this case to give any opinion upon it" (h).

Where the plaintiff, a purchaser of goods, after payment therefor, allowed them to remain in the hands of the vendor, a broker and merchant, and allowed the latter to retain the *indicia* of title (dock warrants) and took no steps to have any change made in the books of the dock company as to the ownership of the goods, and the vendor then fraudulently pledged the goods to the defendant, it was held that the plaintiff was not estopped from recovering the value of the goods from the defendant (i) for the vendor had neither in fact nor in law any authority or power to sell the goods, and the negligence of the plaintiff did not estop him from setting up this want of power because the negligence was said to be in a matter with regard to which the plaintiff owed no duty to the defendant. It is submitted however that it is difficult to reconcile this case with the other cases which we have cited as to negligence with respect to the *indicia* of title.

If a person possessed of a security purporting on the face of it to be transferable by delivery chooses to leave such security in the hands of a third person, and the latter makes it over to a *bona fide* holder for value, the true owner must be taken to have brought about his own loss, and cannot recover it back (j).

It is not, however, accounted negligence on the part of a *cestui que trust* for him to leave title deeds and other *indicia* of title in the hands of his trustee. In *Shropshire Union Railway and Canal Company v. The Queen*, it was argued before the House of Lords that this rule applied only to cases in which the *cestui que trust* takes a limited interest in property, and not to cases where he takes absolutely the whole equitable interest therein, but this

(h) L. R. 7 Chy. App. 87.

(i) *Johnson v. Credit Lyonnais Co.*, 3 C. P. D. 32.

(j) *Goodwin v. Roberts*, L. R. 1 App. Cas. 476; *Rumball v. The Metropolitan Bank*, 2 Q. B. D. 194.

view was not sustained. Lord Cairns there says, "The argument at your Lordships' bar on behalf of the respondent appeared to me to go almost to this, that whenever you have an equitable owner who is the absolute owner, that is to say, entitled to the whole equitable interest, such a person ought not to have a trustee at all holding the *indicia* of legal ownership; or, if he chooses, for his own purpose, to have such a trustee, he must be in danger of suffering for every act of improper conduct by that trustee; and that, therefore, if the person entitled absolutely to the equitable interest in a share in a railway company, chooses for his own purpose to have that share standing in the name of a trustee for him, he will be bound not merely by a valid legal transfer of that share by the trustee, but by any equitable dealing or contract which the trustee may choose to enter into. My Lords, that is a very serious proposition. It goes not merely to shares, but it goes to land, and to every other species of property; and it goes to say that, whereas there is a large, well known, recognised and admitted system of trusts in this country, that system of trust is to be cut down and moulded and reduced to this, that it is to be a system applicable only to infants, married women or persons with limited interests; and that wherever the limited interest has ceased, and the equitable interest has become entire and complete without any limit, then the equitable owner is under some measure of obligation, with regard to his duty of watching his trustee, an obligation which does not lie on a limited owner. I find no authority for such a proposition, and I feel satisfied that your Lordships will not be disposed to introduce, for the first time, that as a rule of law" (*k*).

In the same case it was further urged, that the rule in question, although applicable to individual *cestuis que trustent* was not applicable to companies. But this position was also held to be untenable. Lord O'Hagan said, "In the case of an individual *cestui que trust*, he is held warranted in reposing full confidence in the trustee to whom

(*k*) L. R. 7 E. & I. App. 507.

he commits a power which may be used to his own great detriment; and he is not blameful because to that trustee he gives possession of the *indicia* of property and the muniments of title, although they may be misemployed so as to injure others or himself. It has been urged that a different rule should be applied as to trust estate belonging to a company, but the argument has not been sustained by authority; and I do not see why the principle which governs the case of the individual should not be held applicable to the case of the corporation" (l).

This rule, however applies only to trustees strictly so called and not to mere agents. Sir W. M. James, L.J., in *Hunter v. Walters* (m) says:

"We have simply to consider whether, where an agent has committed a fraud, the principal who has trusted that agent, or another person who has dealt with him has to answer for the consequences of that fraud; whether, where a person has, either through fraud or otherwise, executed a deed, and signed a receipt containing an unmistakable representation of a matter of fact, the person who has so executed the deed and signed the receipt is to suffer the loss arising from an undue use made of them, or another person, who has, in the ordinary course of business, without negligence or default of any kind, trusted to the documents which contained that representation. I am of opinion that the rule of equity is the rule of common sense; that the principal must suffer for the fraud of his agent, and not a stranger who is dealing with the agent; that the man who has made the representations, under whatever circumstances, must bear the consequence of those representations, and not the man who has trusted to the representations so made."

A fraudulent misrepresentation will operate as an estoppel not only as against one who is *sui juris*, but also as against an infant (n), and as against a married woman

(l) L. R. 7 E. & I. App. 515.

(m) L. R. 7 Chy. App. 85.

(n) *Re Shaver*, 3 Chy. Ch. 379; *Bennetto v. Holden*, 21 Gr. 222; *Geyer v. Morrison*, 26 Gr. 69. See *Lampriere v. Lange*, 12 Chy. D. 675.

although she made the misrepresentation under the coercion of her husband (o).

So also will a corporation be estopped, by its negligence or misrepresentations from setting up the invalidity or irregularity of its own proceedings. Therefore a corporation having issued debentures which were assignable and purported to have been executed pursuant to powers conferred by statute was held estopped from alleging as against an innocent assignee for value that the debenture had been issued illegally and in contravention of its statutory powers (p).

In *Swan v. North British Australasian Co.* (q) the doctrine of estoppel by negligence was considered by the Court of Exchequer Chamber. Blackburn, J., there says, "What I considered the fallacy of my brother Wilde's judgment is this: he lays down the rule in general terms 'that if one has led others into the belief of a certain state of facts by conduct of culpable neglect calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards, as against such persons, to show that state of facts did not exist.' This is very nearly right but in my opinion not quite, as he omits to qualify it by saying that the neglect must be in the transaction itself, and be the proximate cause of the leading the party into that mistake; and also, as I think, that it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself; or even of some duty owing to third persons, with whom those seeking to set up estoppel are not privy" (r). This statement of the law is approved of by the full Court of

(o) *In re Lush's Trusts*, L. R. 4 Chy. App. 591; *Sharpe v. Foy*, L. R. 4 Chy. App. 35; *Graham v. Meneilly*, 16 Gr. 661.

(p) *Webb v. Hern Bay Commissioners*, L. R. 5 Q. B. 647.

(q) 2 H. & C. 181.

(r) P. 182.

Common Pleas *per* Lord Coleridge, C.J., in *Arnold v. Cheque Bank* (s).

Brett, J., in *Carr v. London and North-western Ry. Co.* (t), reduces the doctrines of estoppel *in pais* to four propositions. "One such proposition is, if a man by his words or conduct wilfully endeavors to cause another to believe in a certain state of things which he knows to be false, and if the second believes in such state of things, and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist."

"Another recognized proposition seems to be, that, if a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts."

"And another proposition is, that, if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intending to act upon it in a particular way, and he with such belief does act in this way to his damage, the first is estopped from denying that the facts were as represented."

"If in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct or culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief, to his prejudice, the second cannot be heard afterwards, as against the first, to show that the state of facts referred to did not exist."

(s) 1 C. P. D. 587, 588 ; L. R. 10 C. P. 316.

(t) L. R. 10 C. P. 316, et seq.

Moss, C. J. A., referring to these propositions, says, "I apprehend that the propositions formulated by Mr. Justice Brett in *Carr v. London & N.W. Ry. Co.*, L. R. 10 C.P. 307, furnish the tests to which a question of this kind will for the future be subjected. If the circumstances of this case do not bring it within any of these propositions, no estoppel can arise" (u).

A. H. MARSH.

(u) *Mason v. Bickle*, 2 App. R. 298.

EDITORIAL REVIEW.

Federal Extension of Provincial Charters.

Many companies with Provincial charters have from time to time applied to Parliament for power to extend their business into all or any other of the Provinces of the Dominion. The question was raised in the House of Commons this session, and to some extent debated, as to how far the Federal Legislature might go in extending the powers of Provincial companies. It seemed to be admitted on all sides that the company under such circumstances would remain a Provincial company, and subject to Provincial legislation, and that on a repeal of its charter by the Province that granted it, the Dominion legislation, having nothing to operate upon, would become a dead letter.

There seems to be a more serious objection to such legislation. Assuming that the sixteen subjects enumerated in section 92 of the B. N. A. Act are mutually exclusive, the Provincial Legislature can only (under number 11 of that section) incorporate companies with Provincial objects. What is or is not a Provincial object within the meaning of the section is somewhat difficult to determine. If it means that when the object of the company is to restrict its business (whatever it may be) to a particular Province, the Legislature of that Province may incorporate it, it would have been easy to say so, and the Act would not have been ambiguous. At the same time, it is hard to assign any other meaning to the clause; for except the improvement of some locality, such as the drainage of marsh lands in a particular locality, or the working of a particular mine in a certain place, and such like ventures, all of which might however come within number 10 of section 92, there is probably no

business that is of itself Provincial, i. e. of such a character that it can only be carried on in one Province.

Lending money on mortgage of real estate, house building, road making, manufacturing, are none of them Provincial objects *per se* ; but become Provincial objects, if it all, only when a company for carrying on any such business is chartered by a Province for the purpose of carrying on the business in that Province.

Whether a company's object is Provincial *per se*, or becomes so from its operations being restricted to a particular Province, apparently makes no difference. If the object of a company with a Provincial charter is not Provincial, the charter is void *ab initio*. Federal legislation extending its powers would be directed towards an object that did not exist. If, on the other hand, the object of such a company is Provincial, the Province has the right to legislate upon it to the utter exclusion of the Federal Parliament.

Though Federal legislation upon the same subject (i.e., incorporating companies to carry on the same business throughout Canada) might not be *ultra vires*, when the subject is not a local work, Federal restrictions upon particular Provincial companies might be very objectionable, and might well be resented and resisted by them; and Federal extension of their powers can stand upon no higher ground, unless the consent of the company gives jurisdiction—a proposition which it would be difficult to maintain.

Privy Council Appeals.

Though it has been very generally understood for some time that the Judicial Committee of the Privy Council will grant special leave to appeal from the Supreme Court of Canada only in cases of great public interest, or when some important question of law or considerable amount is involved, we have in the last number of the Appeal Cases a case upon the practice, viz., *Prince v. Gagnon*, L. R. 8 App. Ca. 103, in which the principles of *Johnston v. St. Andrews*, 3 App. Ca. 159, are more emphatically expressed than they were in that case. The case depended upon a disputed

matter of fact as to whether there had been a gift or a sale of certain goods valued at \$5,000. The case involved nothing else, and their Lordships refused leave to appeal. Lord Fitzgerald, in delivering judgment, said, "Their Lordships are not prepared to advise Her Majesty to exercise her prerogative by admitting an appeal to Her Majesty in Council from the Supreme Court of the Dominion, save when the case is of gravity involving matter of public interest or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character."

The Master of the Rolls.

We stated in our last number (ante p. 193) that Mr. Horace Davey, Q.C., had been appointed to the vacancy caused by the death of Sir George Jessel, late Master of the Rolls. The remark was based upon a telegraphic despatch to that effect which appeared in the daily newspapers a day or two after the announcement was made in the same way of the death of Sir Geo. Jessel.

It appears from our English exchanges, since received, that the despatch was incorrect, the seat having been filled by the promotion of Lord Justice Brett.

BOOK REVIEWS.

A Treatise on the Law of Dower. By MALCOLM GRÆME CAMERON, of Osgoode Hall, Barrister-at-Law. Toronto: Carswell & Co. 1882.

Mr. Cameron has displayed great industry in this work, and its execution is creditable to the author himself and to Canadian authorship generally. His style is terse and forcible, he is bold in criticism, and he is never ambiguous.

The subject is well divided and methodically arranged. The chapter on marriage is an excellent one, and treats very fully of the subject. We may, however, take exception to the citation of *Hodgins v. McNeil*, 9 Gr. 307, for the proposition there enunciated, that the Constitutional Act introduced into Upper Canada the marriage law as it then existed in England. The opinion there expressed was not necessary for the decision of the case, and therefore never carried the weight that it otherwise would have carried. At any rate, it must now be considered as overruled by *The Lord Bishop of Natal's case*, 3 Moore P. C. N. S. 115, decided about four years afterwards, in which it was held that the ecclesiastical law of England cannot be treated as part of the law which settlers take with them from the mother country. The canonical disabilities rested solely upon the foundation of the ecclesiastical law of England when Upper Canada inherited the English law; and therefore they were not introduced into this country.

At page 122 of his work, Mr. Cameron must be understood as speaking of Exchanges at the Common Law only; for by R. S. O. cap. 98, sec. 6, upon an exchange of lands there is no warranty of title implied from the use of the word "exchange." Chapter 12 treats of dower in estates

in joint-tenancy, co-parcenary, and common. How there can be dower in a parcener's share we cannot, we confess, understand. The cases discussed upon this branch of the subject are American, and the learned Judges quoted from seem to use the term parcener as synonymous with tenant in common.

We confess to a guilty feeling at having picked out these little faults of our author. But they are rendered all the more prominent by the excellence of the remainder of the work. The author deserves well of the profession for having placed before them a well written and valuable treatise on a perplexing subject.

Principles of the Common Law. An elementary work, intended for the use of students and the profession. By JOHN INDERMAUR, Solicitor, author of "Manual of Practice," "Epitome of Leading Cases," "A Concise Treatise on Bills of Sale," etc., etc. Third edition. London: Stevens & Haynes. 1883.

Mr. Indermaur can at least point to the fact that his work is now in its third edition, as an evidence of its usefulness. To our thinking, the treatise is a safe guide for students, though not likely to be much consulted by a professional man in active practice.

REVIEW OF EXCHANGES.

American Law Register.—January, 1883.

Auction Sales, by EDMUND H. BENNETT. The auctioneer disregarding his instructions is liable, like any other agent, for disobeying his principal's directions. There is no contract or implied warranty with or to the public on the part of the auctioneer that the goods will be put up so as to entitle would-be buyers to a claim for loss of time when there is no sale. The auctioneer may postpone a sale to prevent a sacrifice. In sales without reserve he may retract his offer to sell, and withdraw the goods before anybody has bid, but not afterwards. Upon the goods being knocked down to a bidder, the title passes to him though the possession may be retained by the auctioneer till payment; but such sales are within the Statute of Frauds, and if the bid be over £10 the contract is not complete without complying with the statute. The auctioneer is the authorized agent of the vendor to make the memorandum required, and bind the vendor; *sed aliter* as to the buyer, unless under his express directions or with his tacit assent. The subject is further discussed with reference to effect of oral declarations, effect of fraud, rights and remedies of parties, and auctioneers' liabilities. English, American and Canadian cases are cited.

Canada Law Journal.—1st April, 1883.

Consolidation of Mortgages. Distinguished from tacking. It is within the provisions of the Registry Act, and cannot be insisted on a^s against an assignee of the equity of redemption claiming under a registered deed without notice. A mortgage of realty cannot be consolidated with a mortgage of personalty, so as to throw the debt secured by the former upon the latter, as that would be a violation of the Chattel Mortgage Act.

Ibid.—15th April, 1883.

Vendor and Purchaser—Insurance. *Castellain v. Preston*, L. R. 8, Q. B. D. 613; W. N. 1883, p. 52, is discussed, where the Court of Appeal held that, pending a contract for sale of land and buildings, where a loss occurs by fire, the vendor not having assigned the policy cannot recover from the underwriters.

Central Law Journal.—1st December, 1882.

Dedication, by CHARLES BURKE ELLIOTT. A dedication is an act by which the owner of the fee gives the public an easement in his lands. It may be presumed from continued use by the public with the assent of the owner. American cases are cited.

Parent and Child, by J. M. KERR. Some cases on the rights and liability of the parent on behalf of the child are cited.

Ibid.—8th December, 1882.

Limited Partnership (concluded in the following number), ANONYMOUS. The provisions of various statutes applying to such partnerships are discussed.

Ibid.—15th December, 1882.

Farming on Shares, by HENRY WADE ROGERS. "The cases on this subject may be classified under three heads, as giving rise to the relationship of partners, of tenants in common, and of landlord and tenant." Cases of each class are reviewed.

Ibid.—5th January, 1883.

Evidence—Res Gestæ, by Jos. A. JOYCE. Many English and American cases are cited and commented upon.

Forbearance of Suit as a consideration, by MURAT W. HOPKINS. "The prevention of litigation is not only a sufficient consideration but one highly favoured." An agreement to forbear to institute suit upon a valid or doubtful claim is sufficient to support a contract. But contracts to interfere with the course of justice are void.

Ibid.—12th January, 1883.

A Point in the Law of Subrogation, by U. M. ROSK. In *Oneida Bank v. Ontario Bank*, 21 N.Y. 490, a bank had issued post-dated drafts which were forbidden by law to be paid under a penalty. They had been transferred to a third person, who, though he could not maintain an action on them, was held to be substituted to the original rights of action as they existed at the time the drafts were drawn. Cognate cases are cited.

The Compensation of Experts, by HENRY WADE ROGERS. In those states in which their fees are not regulated by statute the general rule is that experts are entitled to compensation for their opinions in evidence as if consulted privately.

Southern Law Review.—June-July, 1882.

Contributory negligence of Carrier as affecting passenger in actions against third persons, by FRANK W. BURNETT. "The question arises whenever injury results to a passenger through the concurring negligence of the carrier and a third party. In such case, is the third party answerable in damages to the injured passenger? If the passenger used due care, and the carrier was negligent, there is no question as to the liability of the carrier, although the negligence of a stranger contributed to the injury; but is the stranger also liable?" The English and American authorities are then discussed. In our own

Courts the subject has received some consideration. In *Nicholls v. G. W. R. Co.*, 27 U. C. R. 382, and *Rastrick v. G. W. R. Co.*, *Ibid.* 396, it was held that the occupants of a cab could not recover against a Railway Company for injuries caused by an accident which might have been avoided if the driver had been more vigilant.

The Limits to Literary and Artistic Criticism, by JOHN D. LAWSON. After a review of numerous cases the learned writer sums up as follows:—"It is protected, however severe, provided it is directed against the work. In other words, the book or artistic production cannot be plaintiff. 2. But the private character of the author is not public property; and the critic cannot make his assault on the work a pretext for a personal attack. 3. Neither is the author himself, nor his private character, open to ridicule. 4. In matters of opinion, the critic, though mistaken, is not legally responsible, for he is not bound to be infallible. 5. In matters of fact it is different; he is liable for making a false charge, as in other cases of libel where privilege cannot be pleaded.

Ibid.—August-September, 1882.

Service of Process upon Corporations, by EDWIN G. MERRIAM. The effect of various Statutes is considered.

Conditional Sales—Sales upon Instalments—Title retained, by THOMAS W. PEIRCE. Such sales are conditional sales, the buyer acquires no title. It has been attempted to make the sale absolute and to place the vendor in the position of a mortgagee, but the attempts have failed. The cases are conflicting as to the rights of third parties who purchase from the vendee in ignorance that he has not paid in full. In *Walker v. Hyman*, 1 App. R. 345, it was held that a purchaser took no title, and that the plaintiffs were not estopped from proving their ownership of the article by having painted their proposed purchaser's name on it when they delivered it to him.

Compromises by Attorneys and Counsellors, by HUGH WEIGHTMAN. The English doctrine with respect to Barristers and Attorneys is given. The Barrister acting in good faith is not responsible for mistake, indiscretion, or error of judgment, and if he enters into a compromise believing it to be the best course to take, it is binding. The Attorney is the client's agent, and cannot compromise without his client's authority. The weight of authority in the U. S. A. is against the general power of an Attorney to bind his client by a compromise.

Ibid.—October-November, 1882.

Estoppels against Married Women, by SEYMOUR D. THOMPSON. "It is believed that the weight of reason and of authority will warrant the statement of the following four general rules:—1. In those cases where the wife is disabled by law from contracting, she cannot suffer an estoppel in consequence of attempting to make a contract. 2. But in those cases where she has capacity to contract, she may suffer an estoppel by matter

resting in contract, the same as a person who is *sui juris* may. 3. In cases where her husband acts as her agent in the care of her realty, or in the care and disposal of her personalty, she will be estopped by his contracts relating thereto, unless she disaffirm the same at the time. 4. She may suffer an estoppel in consequence of her conduct *in pais*, in like manner as if she were sole."

The Law in Relation to Crops—*Fructus Industriales*, by HENRY WADE ROGERS. A very full essay upon the subject in all its aspects.

Negotiability of Detached Coupons, by JAMES O. PIERCE. Where the plaintiff holds both bond and coupons and sues on the coupon alone he can recover, the coupon being appurtenant to the bond. Where the coupons are negotiable by their own terms the holder has a right of action. Where the coupons are not negotiable by their own terms the authorities are conflicting. There are cases both for and against the negotiability of detached coupons when the maker of the bond has failed to employ negotiable terms in the coupons.

The Purchase by Corporations of their own Capital Stock, by EDWARD C. MOORE, JR. In England where no power is granted to corporations to purchase their own capital stock it has been held that such a purchase is beyond the corporate powers and illegal. Various American statutes and cases are discussed.

Ibid.—December-January, 1882-83.

Province of the Judge in a Criminal Trial, by SAMUEL MAXWELL. The duties of Judge and jury are reviewed.

Wrongful Dismissal of Servants—Their Duty—Action—Defence—Evidence, by W. W. THORNTON. The result of the English authorities is that, 1. The servant may treat the contract of hiring as continuing, though broken by the master, and may recover damages for the breach. 2. He may consider the contract rescinded; in which case he can sue on a *quantum meruit* for services actually rendered. As soon as the contract is broken and the servant discharged, it is his duty to seek other like employment. He is not bound to go beyond the vicinity of the place where he was at work. If the servant was engaged in other employment after his discharge, the master may show this in mitigation of damages.

Ibid.—February-March, 1883.

Limitation of the Doctrine of the dissolution of a corporation by the death of all its members, by THOS. D. ROSS. It is generally said of a corporation that the loss of all its members, or of an integral part of itself, by death or otherwise, dissolves it. The rule must now be considered as applicable only to those bodies in the property of which the individual members have not any shares, as a municipal corporation. In trading, manufacturing, etc., companies if all the members should

all die at once, their shares, like any other personal estate, would go to their personal representatives, who would manage the affairs of the corporation until the shares could be allotted to the proper legatees, or when sold should be remitted to them, whereupon such holders would become members of the body politic.

Negotiable Instruments—Collateral Stipulations, by J. M. KERR. Referring to notes with stipulation for attorney's fee on collection by suit, the learned writer, while admitting that a negotiable instrument, which is a substitute for money, should exactly represent a sum certain, contends that when overdue it ceases to perform the office of money, and the reason for the rule no longer exists. The sum it represented was certain while current; as soon as it matured in the last holder's hand it became a security for a greater sum than its face, such sum to be ascertained. Such notes should therefore be held negotiable. A note payable "on or before" a day certain is negotiable, but there are authorities to the contrary.

Corporate Creation and Existence, by FRANK TITUS. Non-performance of conditions precedent invalidate the charter. Where a person has contracted with an assumed corporation *de facto* claiming corporate powers, such person cannot object to the want of requisite organization.

"Presumption" in Indictments for conspiracy, by EDWARD PAYSON PAYSON. Conspiracy differs from any other crime in that it does not include any physical act, but is complete when two or more minds have met in the unlawful agreement. The *corpus delicti* is here a mental act. The logical result is that the mental act must be proven as a fact, and then its intent or malice may be presumed. On the contrary, the jury are generally directed that from certain circumstances, etc., they may presume the conspiracy.

Conditions in Pardons, by FRANK T. REID. It is said that a condition in a pardon which imposes upon the convict the observance of something not known to the law as a punishment is void and the pardon is unconditional.

Auctions and Auctioneers, by CHARLES BURKE ELLIOTT. A very exhaustive article treating of the sale of the rights and powers of an auctioneer, his duties and responsibilities, the effect of puffing and combination, the statute of frauds, and the compensation of auctioneers.

Western Jurist.—January, 1883.

The Conversion of Collateral Securities, by CHARLES BURKE ELLIOTT. The subject is treated under the following heads:—Holders must use due diligence; What constitutes due diligence; Of the right to exchange; Of the right to compromise; Extension of time; Transfer of collaterals by the holder; Who must account for collaterals; Liability for negligence.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

In the Supreme Court of Canada.

NOVA SCOTIA.]

[MARCH, 1883.

In re KING'S COUNTY ELECTION CASE.

Dominion controverted election case—Order extending time for service of petition—Rule rescinding same—Right of appeal from.

On 16th August, 1882, Mr. Justice Rigby made an order *ex parte* extending for twenty days the time for service of the petition, etc. On 26th September, 1882, a rule was made absolute by the Supreme Court of Nova Scotia to set aside this order, on the ground that it had been improvidently granted; 2 C. L. T. 490. On 30th September, 1882, the same learned Judge made another order extending the time for service to the 15th October then next. On 15th January, 1883, a rule was made absolute by the Supreme Court of Nova Scotia to set aside the latter order, on the ground that the affidavits on which it had been granted disclosed no facts unknown to the petitioner when the order of the 16th August, 1882, was obtained, and the petitioner appealed to this Court.

Held, Fournier and Henry, JJ., dissenting, that the judgment appealed from was not a "judgment, rule, order or decision" from which an appeal would lie under section 10 of the Supreme Court Amendment Act of 1879.

H. McD. Henry, Q.C., for the appellant.

Hector Cameron, Q.C., for the respondent.

P. E. ISLAND.]

In re QUEEN'S COUNTY ELECTION CASE.

Dominion controverted election case—Marking of ballots—Scrutiny—Deputy Returning Officers' neglect—Recriminatory case.

Ballot papers containing the names of four candidates were held good in the following cases:—

1. Those containing two crosses, one on the line above the first name, and one on the line above the second name, well marked for the first two candidates.

2. Those containing two crosses, one on the line above the first name, and one on the line dividing the second and third names, well marked for the first named candidate only.

3. Those containing properly made crosses opposite two of the names, with a slight lead pencil mark opposite another name, well marked for the two first mentioned names.

4. Those marked thus Y

The following ballots were held invalid:—

1. Those marked with a cross on the back of the ballot, instead of on the printed side.

2. Those marked with an x instead of a cross.

In three polling districts the Deputy Returning Officers had placed their initials on the counterfoil, before giving the ballots to the voters, and then before the ballots were placed in the box they detached and destroyed the counterfoils. It was proved that the ballots used by the voters were the same as those supplied to them. All such ballots having been rejected by the County Judge on a re-count, J., the appellant, who was in the minority by the count of the Returning Officer, was elected. On appeal to the Supreme Court of Prince Edward Island, the ballots were held good; ante p. 23.

Held, affirming the judgment of the Court below, that, the Deputy Returning Officers having had the means of identifying the ballot papers as those supplied to the voters, their neglect in not putting their initials on the back thereof, not having affected the result of the election or caused substantial injustice, did not invalidate the election.

The *Monck Election Case*, Hodg. El. Ca. 725, commented on and approved.

Quære, whether a County Judge on a re-count can object to the validity of a ballot paper when no objection has been made to the same by the candidate or his agent, or an elector, in accordance with the provisions of the Dominion Elections Act, 1874, sec. 56.

The appellant, J., claimed, under sec. 66 of the Dominion Controverted Elections Act, 1874, sec. 66, that if he was not entitled to the seat, the election of B., the respondent, should be declared void on the ground of irregularities in the conduct of the election generally; he filed no counter petition, and did not otherwise comply with the Act.

Held, that sec. 66 of that Act applies only to cases of recriminatory charges, and not to a case where neither of the parties, nor their agents are charged with doing any wrongful acts.

Hector Cameron, Q.C., for the appellant.

Lash, Q.C., for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B.]

[24TH MARCH, 1883.

In re HIGH SCHOOL BOARD, DISTRICT NUMBER FOUR OF THE UNITED COUNTIES OF STORMONT, DUNDAS, AND GLENGARRY AND THE TOWNSHIP OF WINCHESTER.

High School District—Separation of part—Liability to contribute—Money demanded before separation.

The decision of the Court of Queen's Bench, 45 U. C. R. 460; 1 C. L. T. 51, was reversed.

Bethune, Q.C., for the appellants.

McCarthy, Q.C., for the respondents.

MAW v. THE TOWNSHIPS OF KING AND ALBION.

Negligence—Contributory negligence.

The defendants left unrepaired for a month a trench running across a highway which they were bound to keep in repair, formed by the flow of water which escaped from a culvert, and the deceased, in crossing in a wagon while lawfully travelling on the highway, was thrown from his wagon and killed. It was said that he was intoxicated at the time. The learned Judge left it to the jury to say, in addition to answering other questions, whether the deceased so contributed to the accident that but for want of reasonable care on his part the accident would not have happened. The jury answered this question in the negative.

Held, affirming the decision of the Court below refusing an order nisi for a non-suit, that the question of contributory negligence was properly left to the jury.

Robinson, Q.C., and *Shepley*, for the appellants.

G. H. Watson, for the respondent.

MURRAY v. McCALLUM.

Married woman—Separate trading.

In order that a business carried on by a married woman should be a separate business within the meaning of the Married Women's Act, it is not essential that her husband should live apart from her, or that the business should be carried on in a different house from that in which the husband and wife reside.

The plaintiff's husband failed in the business of a tenant farmer, and the plaintiff being possessed of a small sum of money and a piece of land, undertook the business of hotel-keeping. She had at two several times a partner. The husband was employed by her as barkeeper at fixed wages and lived with her in her hotel. The plaintiff's goods were seized under an execution against the husband. In an interpleader issue a verdict was entered for the plaintiff, and the Divisional Court refused to disturb it.

Held, per Spragge, C.J.O., and Cameron, J., that the plaintiff was a separate trader, the husband having in fact no control of the business, but being hired for a specific duty.

Per Burton, J.A. Under the Married Women's Act the intention was not that there should be an enquiry as to the *bona fides* of such a transaction; but that any interference by the husband in the conduct of the business with the wife's concurrence deprived it of its separate character.

Per Burton and Patterson, J.J.A. The evidence showed that there was in fact such an interference by the husband in the conduct of the business as to prevent its being the separate business of the wife.

McCarthy, Q.C., and *Laidlaw*, for the appellant.

Bethune, Q.C., and *D. Morrison*, for the respondent.

C. P.]

HALE v. KENNEDY.

Appeal on question of fact.

Where the finding of the learned Judge at the trial upon a question of fact was reversed by the Divisional Court, and both judgments gained support from the evidence according to the aspect in which the facts were

treated, this Court refused to reverse the judgment of the Divisional Court, it not appearing with certainty that it was wrong.

Robinson, Q.C., and Burritt, for the appellant.

Bethune, Q.C., and Deacon, Q.C., for the respondents.

SILSBY v. THE CORPORATION OF THE VILLAGE OF DUNNVILLE.

Municipal corporation—Contract not under seal.

The judgment of the Court below, 31 C. P. 301; 1 C. L. T. 61, was affirmed.

McCarthy, Q.C., and W. Nesbitt, for the appellants.

Bethune, Q.C., and A. Bruce, for the respondents.

HOWARTH v. SINGER MANUFACTURING CO.

Incorporated company—Appointment of agents and sub-agents—Yearly hiring—Wrongful dismissal.

The defendant company was a foreign corporation whose directors had authority to appoint such subordinate officers as the business of the corporation might require. By power of attorney under the corporate seal, they appointed a general agent at Toronto, to take charge of, conduct and manage the business of the agency at Toronto and of its sub-agencies, giving him power to do everything necessary and requisite to all intents and purposes as the company could do. He appointed the plaintiff a sub-agent for a year, and at the end of that and each succeeding year he renewed the appointment for a year. The plaintiff was paid \$15 a week and a commission on sales. He was summarily dismissed. Some evidence was given for the defence that the corporation were in the habit of appointing their agents and sub-agents at will.

Held, Spragge, C.J.O., dissenting, affirming the judgment of the Court below refusing an order nisi for a nonsuit, that the appointment from year to year was clearly within the authority of the directors, that the same general authority was delegated to the general agent, and that the plaintiff had a right to rely upon the authority so given when he entered into the engagement.

Per Spragge, C.J.O. Though the defendants acquiesced in the appointment of the plaintiff, there was no acquiescence in the terms of the appointment, and it appeared that their practice was to engage their agents at will only. The power of attorney, if it gave power to appoint sub-agents at all, did not give power to appoint them by the year; and the general agent was not held out by the company as having any such authority.

G. H. Watson, for the appellant.

Robinson, Q.C., for the respondent.

BOSWELL v. SUTHERLAND.

Bond to deliver chattels—Destruction by accidental fire—Performance excused—Pleading—Demurrer.

Action on a bond conditioned that the obligor would produce or cause to be produced certain chattels, in the event of default being made by one P. in payment of a sum of money lent by the plaintiff to P. upon the security of a chattel mortgage on the chattels. Defence, that before the time for payment arrived and before the time specified in the bond for the production of the chattels, and before any breach of the bond, the chattels were destroyed by an accidental fire, without any default of the defendant, and the goods were not in existence when the plaintiff became entitled to their production. Demurrer.

Held, that the defence was bad without negating default in P. as to the destruction by fire of the chattels.

Per Spragge, C.J.O. The accidental destruction by fire without default of the defendant or P., would excuse the performance of the contract.

The judgment of the Court below was for allowing the demurrer, on the assumption that the defence had been amended, but the appeal book not showing the amendment to have been made, the defence as appearing therein was held bad on the demurrer, and the appeal allowed.

McCarthy, Q.C., and *Eddis*, for the appellant.

McPhillips, for the respondent.

QUINLAN v. THE UNION FIRE ASSURANCE CO.

Action on fire policy—Verdict—Interest—Power of Court of Appeal to award—Pleading.

In an action on a fire insurance policy, the learned Judge at the trial declined to allow interest to the plaintiff upon the sum recoverable. The verdict was set aside by the Court of Common Pleas, 1 C. L. T. 211, and a verdict directed to be entered for the defendants. This judgment was reversed on appeal, *ante* p. 156, and the verdict restored, the question of interest being reserved. By the Court of Appeal Act, sec. 43, when this Court gives judgment for the respondent, interest shall be allowed by the Court for such time as execution has been delayed by the appeal. By section 23 of the Act the Court shall have power to give any judgment and make any decree or order which ought to have been made, or to award restitution and payment of costs, or to make such further or other order as the case may require.

Held, that the plaintiff was not entitled to interest upon his verdict, the case not coming within sec. 269 of the Common Law Procedure Act, and that this Court had neither power nor discretion to allow interest in any

other cases than those coming within section 269 of the C. L. P. Act and section 43 of the Court of Appeal Act.

Remarks as to unnecessarily long pleadings where a demurrer was before the Court, and the consequent labour cast upon the Court of analyzing the pleadings where counsel do not point out clearly the exact point raised by the demurrer.

Where the replications in Common Law pleading do not deny the pleas, but simply set up matter in avoidance which is good in law, it is a good pleading in confession and avoidance.

Bethune, Q.C., and Dixon, for the appellant.

McCarthy, Q.C., and A. C. Galt, for the respondent.

C. P. D.]

OLIVER v. NEWHOUSE.

Landlord and tenant—Lease of farm stock—Execution creditor—Termination of tenancy—Revesting of chattels—Chattel mortgagee.

The appeal from the judgment of the Court below, 32 C. P. 9; 1 C. L. T. 58, was allowed, and a new trial directed.

Per Spragge, C.J.O. There was nothing upon which an execution against the goods of the son could operate from the day of the termination of the tenancy. The Chattel Mortgage Act did not apply, for there was no sale by the son to his father, the goods reverting to the latter when the tenancy ended. But if it was a sale, then there was an immediate delivery followed by an actual and continued change of possession within the meaning of the Act, the management and control of the goods having passed from the son to the father.

McCarthy, Q.C., and Milligan, for the appellant.

Robinson, Q.C., and McFadden, for the respondent.

SPRAGGE, C.]

ALLEN v. McTAVISH.

Fraudulent conveyance—Evidence—Res judicata.

The decision of the court below, 28 Gr. 539; 1. C. L. T. 276, was reversed.

BLAKE, V.C.]

ANDERSON v. BELL.

Will, Construction of—Family, meaning of.

The judgment of the Court below, 1 C. L. T. 381 touching the construction of the word "family" was affirmed.

Robinson, Q.C., and Proctor, for the appellant.

J. Hoskin, Q.C., Moss, Q.C., and J. E. McDougall, for several defendants, respondents.

W. Mortimer Clark, for plaintiffs, respondents.

C. C. HASTINGS.]

DANFORD v. DANFORD.

Interpleader—Sale of chattels—Change of possession—Notice to particular creditor—Effect of.

Interpleader issue. The defendant seized a horse under an execution for the costs of an unsuccessful action brought against him by his father, and it was claimed by the plaintiff, the defendant's brother, under the following circumstances. The father had sold his farm in equal parts to the plaintiff and defendant, who immediately assumed possession and control, and the father continued to live thereon with his sons and supported by them. The sons bought all the chattel property, and amongst other things, the plaintiff bought the horse in question, but no bill of sale was taken. The horse was kept on the farm, and was used and controlled by the plaintiff, but the father sometimes used him for his own purposes. The jury found for the plaintiff.

Held, affirming the judgment of the Court below, that such an actual and continued change of possession as is necessary to satisfy the Chattel Mortgage Act, and to dispense with the necessity of a bill of sale, should be a change visible and apparent to the public; but where a particular creditor has knowledge of an actual sale and change of possession, as in this case, it is sufficient as to him, whether the rest of the public know of it or not.

J. K. Kerr, Q.C., and Skinner, for the appellant.

Clute, for the respondent.

High Court of Justice.**COMMON PLEAS DIVISION.**

[OSLER, J., APRIL, 1883.]

LEITCH v. McLELLAN.*Dower—Life estate—Estate by entireties.*

Where a husband died entitled to the reversion in fee in certain lands expectant on a life estate therein,

Held, that dower could not be claimed therein, for that the husband had never been seised during coverture.

A lease for life to a husband and wife makes them tenants by entireties, so that the whole accrues to the survivor.

The demandant, who was a stranger to the estate, was held not entitled to set up that there had been a forfeiture of the life estate by non-payment or other breach of covenant.

Jacob, for the demandant.

Guthrie, Q.C., and *Watt*, for the defendant.

CHANCERY DIVISION.

[THE CHANCELLOR, 25TH APRIL, 1883.]

SMITH v. MIDLAND RAILWAY CO.

Railway Company—Tax sale—Limitation of actions—Time of commencement—Irregularity in sale.

Land of a railway company, including the roadway, being taxable (32 Vict. cap. 36, O.), is also saleable for non-payment of taxes. The statute

of limitations does not begin to run against the purchaser of land sold for taxes from the date of the sale, but from the expiration of the time for redeeming him.

A tax sale and deed are not impeachable for the default of a subordinate officer in carrying out the special provisions of 32 Vict. cap. 36 (O), where the deed has not been questioned within two years; the remedy in such cases seems to be against the defaulting clerks and assessors, under sec. 117 of the Act.

STETHAM v. ULLYOTT.

Trespass to Land—Payment into Court—Costs.

Action for trespass to land, claiming an injunction. Defendant set up tender before action of \$100, and paid that sum into Court, which the plaintiff took out after the time mentioned in Rule 218, but before the trial. The Court was of opinion that the case was not one for an injunction, the user of the lands having been for a temporary purpose.

Held, that the case was a proper one for the exercise of discretion as to costs within Rule 428, and that the plaintiff should therefore get his costs up to the payment into Court by the defendant only, in case he elected to retain the \$100 in full of damages; no further costs to either party; if plaintiff desired a reference, further directions and costs should be reserved.

[PROUDFOOT, J., 4TH APRIL, 1883.]

In re McCAUGHEY & WALSH.

Solicitor and client—Misconduct of solicitor's partner.

A sum of money had been received and wrongfully retained by M., one member of a firm of solicitors. An order had been made against both solicitors for the payment of the money, and in default that they be struck off the rolls. A motion was now made to rescind the order as far as it affected W., on the ground that no personal misconduct had been shown,

though he might be under a legal obligation as a member of the partnership to pay the money.

Held, that there must be personal misconduct on the part of a solicitor to justify striking him off the rolls.

Held, also that a summary order to pay over the money in such a case will not be made where there is no misconduct.

J. H. Macdonald, for the motion.

Hoyles, contra.

[11TH APRIL, 1883.]

McCLENAGHAN v. GREY.

Church Temporalities Act—Bequest to Incumbent for a charity—Action by Churchwardens—Demurrer.

Claim : that plaintiffs, who sue on behalf of themselves and all other members of the congregation of St. P. Church, are churchwardens thereof ; setting out the creation of the rectory, and that the freehold of the church is vested in the incumbent and churchwardens by the Church Temporalities Act ; the appointment of the present incumbent ; that B. W. bequeathed \$500 and other property to the incumbent for the time being, for the use and relief of the poor of the church, to be dispensed by the incumbent ; the refusal of the defendants, B. W.'s executors, to allow the incumbent to dispense the fund, and asking administration and a declaration that the incumbent is entitled to distribute the fund. Demurrer thereto.

Held, that the incumbent is not a member of the congregation in the sense in which the plaintiffs and the other members are, and was not represented by the plaintiff, and at any rate that the plaintiffs had no title to bring the action under section 6 of the Church Temporalities Act, or otherwise.

[FERGUSON, J., APRIL 26TH, 1883.]

McMURRAY v. ANGLO-CANADIAN MORTGAGE CO.

Mortgage—Partial Advances—Action to Recover Residue.

C. borrowed from the defendants a sum of money secured by mortgage of land and buildings in course of erection thereon, the money to be advanced from time to time as the buildings progressed. The mortgage was drawn on the Building Society plan; C. becoming embarrassed after he had received some advances, the plaintiff agreed to purchase his Equity of redemption, and agreed with the defendants to make new mortgages, one on each house, which would be in all for a larger sum than C's, and the defendants were to advance the difference between what was due by C. and the face of the new mortgages. Subsequently, and after some money had been advanced, a dispute arose as to the amount still due.

Held, upon the evidence, that there was a large sum still to be advanced under the new mortgages, and that the plaintiff had the right to bring an action for the recovery thereof as for money due, the account to be taken by the Master.

The transaction took place before the 44 Vict. cap. 49 (Q), by which the securities of the defendants were transferred to the Omnium Securities Company, and the defendants ceased to carry on the business of a loaning company.

Held, that the defendants were the proper parties to be sued.

McCarthy, Q.C., and *C.L. Ferguson*, for the plaintiff.

W. Nesbitt for the defendants.

MERCHANTS' BANK v. MOFFATT.

Bond—Ignorance of contents and effect—Validity.

The defendant, as surety for M. Bros. & Co., who were largely indebted to the plaintiffs, executed a bond conditioned for the payment to the plaintiffs of \$10,000, if there should be a deficiency in the assets of M. Bros. & Co., or if certain real property, which they had mortgaged to the plaintiffs, should appear to have been overvalued. He did not read the bond, but relied upon M.'s representations as to its effect, and he now said that

he supposed the bond to make him liable only in case there had been an over estimate of the value of the real property. M. Bros. & Co. became insolvent, and there was a deficiency in their assets.

Held, that the defendant was liable on the bond.

Held, also that the transaction was not in violation of the law respecting Banks and Banking.

Robinson, Q.C., and *J. F. Smith*, for the plaintiff.

McCarthy, Q.C., and *J. H. Ferguson*, for the defendant.

IN CHAMBERS.

[HAGARTY, C.], APRIL, 1883.

PARK v. PATTON.

Judgment for immature claims—Setting aside.

The plaintiff served his writ of summons on the defendant on 19th February, specially indorsed for claims part of which were then due and part of which would mature on 1st March, part on 5th March, and the residue on 15th March. The defendant appeared, but by error the appearance was entered in the wrong office. The plaintiff obtained judgment by default on 1st March, and issued execution on 9th March for the whole amount. On 23rd February the defendant made an assignment for the benefit of creditors. He did not know of the plaintiff's execution until 15th March, and moved within a few days to set aside the judgment and execution for the excess over what was due when the writ of summons was issued; but he offered no opposition to the plaintiff's right to proceed and recover judgment for the excess by process issued after it was due.

Held, reversing the order of John Winchester, Esquire, Official Referee, that the judgment should stand only for the amount due at the time the writ of summons was issued.

W. Macdonald, for the motion.

W. H. P. Clement, contra.

[THE CHANCELLOR, 23RD APRIL, 1883.]

MITCHELL v. BARRETT.

Mortgage action—Redemption—Revivor—Costs.

The plaintiff, a mortgagee, brought this action for foreclosure. R., a subsequent encumbrancer, redeemed the plaintiff, being, in turn, liable to be redeemed by an encumbrancer subsequent to him. R., proceeding under Rule 385, took out an order of revivor. The taxing officer disallowed the costs of this order.

Held, that the order was not improperly issued, and that the costs thereof should be allowed.

Caswell for the motion.

[25TH APRIL, 1883.]

BANK OF MONTREAL v. COUSINS.

Defence and demurrer—Trial of issues of fact and law together.

In an action against several defendants, some of the defendants combined with their defences on the facts demurrers to the whole statement of claim. The demurrers were not filed soon enough to permit of their being argued and disposed of before the trial. A motion was made for leave to enter the action for trial notwithstanding the combined demurrers and defences, and notwithstanding that the demurrers had not been argued or disposed of, and that they be argued and dealt with by the Court at the trial of the action.

Held, that the order should be made as asked.

H. Cassels, for the motion.

Hoyles, contra.

H. C.

[PROUDFOOT, J., MARCH, 1883.]

ROBERTSON v. DAGANEAU.

Changing place of trial—Preponderance of convenience.

The plaintiff, living in Scotland and being possessed of large estates in Ontario, employed a firm of solicitors in Toronto as his agents, who, through their agent at Chatham in the County of Kent, agreed to sell certain lands in the County of Essex to the defendant. The defendant, his solicitors, and all his witnesses (four at least) lived either in, or west of, Chatham. The plaintiff's witnesses, except his solicitors in Toronto, also lived in, or west of, Chatham, but their number was not disclosed. The difference in expense was estimated at from \$20 to \$40. The plaintiff named Toronto as the place of trial.

Held, reversing the decision of John Winchester, Esquire, Official Referee, who changed the place of trial to Chatham, and following the principle of *Davis v. Murray*, 9 P. R. 222, that a very great preponderance of convenience or expense must be shown in order to deprive the plaintiff of his right to name the place of trial wherever he might see fit, and such a preponderance was not shown here.

J. T. Small, for the plaintiff.

H. Cassels, for the defendant.

H. C.

TRUST AND LOAN CO. v. MCCARTHY.

Mortgage action—Præcipe judgment.

This was a foreclosure action in which the defendant filed a statement of defence, setting up that the plaintiffs were in possession as mortgagees, and that they had not got in all the rents and profits which they should have obtained, and it prayed a reference to the Master to ascertain the amount due upon the mortgage. The plaintiffs applied to the Registrar for a *præcipe* judgment, contending that they were entitled thereto under Rule 78 of the Judicature Act. The Registrar refused to issue the judgment on the ground that Rule 78 is one of a group of rules set forth in the Act under the heading "Default of Appearance," and that this grouping clause restricted the application of that rule.

Marsh applied for a direction to the Registrar to issue a *præcipe* judgment and referred to Holmsted's Manual of Practice, p. 104, and MacLennan's Judicature Act, p. 129.

PROUDFOOT, J.—Rule 78 does not authorize the issue of a *præcipe* judgment in such a case. Before the Judicature Act such a judgment might have been obtained under General Order 435, which is referred to and extended by General Order 646. It is true that General Order 435 is not among those Orders which are expressly made applicable to the present practice by Rule 3, but General Order 646 is among those Orders, and I think that, by reference, it incorporates with it General Order 435. The Registrar will therefore issue the usual *præcipe* judgment.

NOTE.—The endorsement on the plaintiffs' writ, as well as the statement of claim, asked for an order for possession, but on applying for the judgment in pursuance of the above direction, the Registrar refused to insert the usual order for possession, by reason of the allegation in the statement of defence that the plaintiffs were already in possession; but after consultation with Proudfoot, J., he inserted the usual order for possession, without prejudice to any question that might be raised by the defendant on the taking of the account as to the liability of the plaintiffs to account as mortgagees in possession.

(Reported by A. H. Marsh, Esq., Barrister-at-Law.)

[PROUDFOOT, J., 9TH APRIL, 1883.]

GAGE v. CANADA PUBLISHING COMPANY.

Taxation of costs—Copy writ—Fee on præcipe order—Attending to hear judgment—Disbursement for shorthand notes.

The trial began in October, 1882, and continued four days, when it was adjourned till 22nd December, the learned Judge being obliged to do circuit duty in the meantime. Thirty-two witnesses had been examined, and eleven hundred and eighty-five folios of evidence taken. The plaintiff's solicitor procured a copy of the evidence for the use and convenience of counsel at the adjourned trial, when other witnesses were examined and the case argued. The taxing officer having ruled that it was the duty of junior counsel to take notes of the evidence, disallowed the disbursement for the copy of the evidence.

Held, reversing his ruling, that the item should be allowed between party and party as a necessary disbursement at the trial of the action.

The Clerk of Records and Writs required a full copy of the writ of summons to be filed in his office before issuing the writ. The taxing officer allowed but fifty cents for this copy.

Held, that the plaintiff was entitled to tax one dollar for this, or any other, copy of writ of summons, under item 13 of the tariff.

The taxing officer disallowed the fee of one dollar upon all *precipe* orders.

Held, that *precipe* orders are orders of the Court, and that a fee of one dollar should be allowed thereon, under item 122 of the tariff.

Judgment was reserved at the trial of the action, and the written judgment of the Court was sent to the Registrar's office for perusal instead of being read in open Court. Coupsel attended at the Registrar's office, and there read the judgment.

Held, reversing the ruling of the taxing officer, that such attendance was an attendance to hear judgment within the meaning of item 105 of the tariff, and that a fee of two dollars should be allowed therefor.

S. H. Blake, Q.C., for the appeal.

W. Davidson and W. Barwick, contra.

H. C.

FOSTER v. STOKES.

Taxation—Execution for costs—Payment—Revision—Re-payment of excess.

On 30th December, 1882, the defendants' costs of the action were taxed by the local master at London, and writs of execution therefor were immediately issued and placed in the Sheriff's hands. On 1st January, 1883, the agent of the plaintiff's solicitor informed the defendants' solicitor that he had received the money to pay the costs, and that they would be paid the next day, and asked him to withdraw the writs. The defendants' solicitor consequently withdrew the writ and paid the Sheriff's fees, and the next day received payment. Notice of revision was then given, and the bill was reduced upon revision. The defendants' solicitor, being requested to refund the amount by which it had been reduced, refused.

Hoyles now moved for repayment of the amount revised off the bill, less sheriff's fees and costs of writ. He contended that the costs had been paid under protest.

H. Cassels, contra, contended that the costs had not been paid under protest; that what had been done was a settlement, and that the revision was a breach of good faith; that there was no jurisdiction in Chambers on a summary application to order the re-payment, even if the re-payment should be made. He cited *In re A. B. & C. D.*, 8 P. R. 126; *In re Clarke*, 9 P. R. 197. The proper practice in such a case is provided by Rule 439 (*d*).

JOHN WINCHESTER, ESQ., OFFICIAL REFEREE, 10TH APRIL, 1883, ordered re-payment of the amount asked for, with costs of the motion, referring to *Citizens' Insurance Co. v. Parsons*, 32 C. P. 492; *Rodger v. Comptoir d'Escompte de Paris*, L. R. 3 P. C. 465.

H. C.

NEW BRUNSWICK.

In the Supreme Court.

[NOVEMBER, 1882.]

JONES v. MORGAN.

Adverse possession—Tenants in common—Partition by consent without deed—Person claiming under, entitled to avail himself of the partition.

A. and B., tenants in common of a lot of land, divided it without a deed of partition, and afterwards occupied their separate portions according to that division. J., after the division, came into possession, under A., of his part.

Held, that he had a right to avail himself of the partition and of A.'s occupation.

TORRENS AND WIFE v. CURRIE.

Dower before assignment — Conveyance — Acknowledgment taken out of Province—Dower.

A deed acknowledged out of the Province had on it the following certificate of the Notary Public taking the acknowledgment :

"City of Boston, etc. April 10th, 1876. Then personally appeared J. T. and acknowledged the foregoing instrument to be his free act and deed. —J. A., Notary Public." The name "J. T." was the same as that of the grantor.

Held, that the acknowledgment was bad, because the Notary had not certified that the person appearing before him was the grantor.

A widow has not, previous to her dower being assigned, an estate of freehold in the lands of her deceased husband.

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STOPPAGE IN TRANSITU—INTERVENING PROCESS.

WE print in this number a decision of the learned Judge of the County Court of the County of Waterloo, upon this interesting point. Strange to say, there is a plentiful lack of direct authority upon the question in the one hundred and thirty odd volumes of reports, which contain the judicial interpretations of our *lex scripta* and *lex non scripta sed impressa*. As far as we can learn the point has hardly been more than noticed in England, the only cases approaching the subject being those cited in the judgment in *McLean v. Breithaupt, postea*. To the American Courts, however, our thanks are due for most explicit and unwavering language in assertion of the paramount rights of the vendor.

It may be useful, then, to thread together a few of the American authorities, so that the next searcher after the truth may be able to pick up the string and tell his beads of the law with ease.

The laws of New York, Maine, Massachusetts, Kentucky, Maryland, Pennsylvania, Mississippi, and Ohio, are a unit, the decisions all exhibiting a thorough consensus of opinion. In New York we have *Le Ray de Chaumont v. Griffin*, an unreported case, cited in *Buckley v. Furniss (infra)*, in which the facts were as follows:—The plaintiff sold iron to Wallbridge & Co., on credit. While it was in the hands of Butterfield, a forwarding

merchant, an execution against the vendees at the suit of certain creditors was levied on the property. After the levy, the plaintiff, learning that the vendees had become insolvent, directed Butterfield to retain the property, claiming that his right of stoppage *in transitu* had not been forfeited. The sheriff, disregarding the plaintiff's claim, proceeded on the execution and sold the iron to the defendant, who purchased for the judgment creditors. The plaintiff's agent attended and forbade the sale. The defendant, after the sale, took the iron and carried it away, and the plaintiff brought an action to recover the value. *Held*, that the plaintiff had the right of stoppage *in transitu* notwithstanding the levy.

But it was more than hinted that if the defendant (the purchaser at the sale) had parted with his money before the vendor had asserted his right, the decision would have been otherwise. This seems almost to amount to a truism. But it will be noticed that the action was against a purchaser with money, and it may be utilized as pointing to the period of time at which, in the eye of the law, the plaintiff's title to the goods becomes forfeited and passes to the purchaser.

We shall see that he has still a right *in rem* by taking proper proceedings, within the proper time, to attach the fund arising from the sales.

This case was followed in *Buckley v. Furniss* (a), where the Court said, "If the attachment had been duly proved it would not have constituted a good defence. The defendant Furniss, as an attaching creditor, could have no better right to the goods than Titus (the vendee) had himself. He might, by legal process, acquire a priority over other creditors, who were less diligent, and thus secure his debt; but he could not divest a right already existing in the plaintiff. The process does not proceed on the ground of defeating a prior right in a third person, but on the ground of acquiring such interest in the property attached as the debtor had himself. If the levy of an execution, or the

(a) 15 Wend. at p. 143.

service of an attachment against the vendee, were allowed to defeat the claim of the vendor, the right of stoppage *in transitu* would be of little value; for, in this State, judgments and attachments not unfrequently furnish the first public evidence of the insolvency of a trader." And to the like effect is *Clark v. Lynch* (b).

In Massachusetts the leading case appears to be *Naylor v. Dennie* (c), where it is said by Parker, C. J., "If the plaintiff had the right of stoppage *in transitu* and reclaiming the goods, and duly exercised the right, the intervening attachment could not defeat it. The right is founded on an implied condition in the sale, that if the vendee should become actually insolvent between the shipment of the goods and the reception of them by the vendee, the vendor shall have the right to rescind the contract and reclaim the goods. To allow an attachment, before the *transitus* is at an end, to have effect, will be to defeat a useful and necessary provision of the law merchant."

This case was followed by *Durgy Cement Co. v. O'Brien* (d), and *Seymour v. Newton* (e).

In Mississippi, the law, as laid down in *Naylor v. Dennie*, was adopted without comment in *Morris v. Shryock* (f).

To the same effect is *Newhall v. Vargas* (g), where the law of the State of Maine is seen to conform to that of the other States in which the point has arisen, the court holding that the vendor's lien is not divested because possession of the goods may have been obtained by process of law issued against the vendee.

In Kentucky the court describes the right of stoppage *in transitu* as coeval with and springing out of the very contract by which the vendee claims the goods. They are said to be in motion during the *transitus* in answer to the original impulse imparted to them by the touch of the vendor, and

(b) 4 Daly (N. Y.) 83.

(c) 8 Pick. 198, at p. 203.

(d) 123 Mass. 12.

(e) 105 Mass. 272.

(f) 50 Miss. 590; see also *Dickman v. Williams*, Ib. 500.

(g) 15 Maine 314.

while the motion continues, the creditors of the vendee cannot seek the aid of the law to shake off the hand of the vendor and claim the goods for their own benefit. The expression used is that the vendor's right cannot be superseded by an attachment at the suit of a general creditor—the term “general creditor” being used, apparently, to distinguish him from one having a particular lien (*h*).

In Pennsylvania the same doctrine is expressed as follows:—“Nor do I think that the defendants' first point, the seizure under writ of foreign attachment presents any difficulty in the way of the plaintiffs' recovery. The creditors of the consignee can obtain no greater right over the goods than the consignee himself had when the attachment was served. The right of stoppage *in transitu* is not defeated by the goods being attached by process of foreign attachment, any more than by the right of a carrier to retain for a general balance” (*i*).

In Ohio the law is said to be that, “the seizure of goods *in transitu* at the suit of the consignee's creditors, does not extinguish the vendor's right of stoppage, but furnishes him a cause of action for them or their value against the officer making the seizure, which will be enforced if asserted in due time” (*j*). In Ontario the trial of the right would most probably take the form of an interpleader issue.

The point of time at which the *transitus* ceases is, of course, a most important element in the enquiry. The question has been fully discussed in almost every case of any moment in which the doctrine has been considered. We shall refer to but two cases in which, resort being had to the original equitable right out of which the whole doctrine grew, Courts of Equity permitted an appeal to their peculiar jurisdiction as long as they were possessed of and controlled the fund.

In the Kentucky Court of Appeals, the case of *Hause v. Judson* (*k*) illustrates this exercise of the jurisdiction.

(*h*) *Wood v. Yeatman*, 15 B. Mon. 270.

(*i*) *Hays v. Mouille*, 14 Penn. St. 48.

(*j*) *Calahan v. Babcock*, 21 Ohio St. 281.

(*k*) 4 Dana 13.

Goods were consigned to Judson; while on the way they were stopped in B.'s hands by an attachment in Chancery at the instance of A. & A. On these proceedings an order was made directing B. to sell the goods of Judson, make report of the sales, and hold the proceeds subject to the further order of the Court. The plaintiff then filed a bill claiming the right of stoppage *in transitu*. A decree was made declaring A. & A. prior to the plaintiffs, under their writ of attachment, and from this decree an appeal was taken. Marshall, J., in giving judgment, said, "We are of opinion that the decree is subject to the more radical objection of having improperly given precedence to the claim of A. & A. when, so far as relates to the goods of which Hause & Son were vendors, their claim under the right of stoppage *in transitu* was paramount." After referring to the principles of the law relating to stoppage *in transitu*, the learned Judge continues, "A necessary consequence of these principles and of the established properties of the right in question is, that it cannot be superseded by an attachment at the suit of a general creditor of the vendee, levied while the goods are *in transitu*. [Reference is here made to *Northey v. Field*, 2 Esp. 481; *Smith v. Goss*, 1 Camp. 282]. If then the right asserted by the complainant existed when the goods were attached by A. & A. it was neither defeated nor postponed by the attachment. * * The attachment did not, as we have seen, defeat the vendor's right to which the goods, being then *in transitu*, were subject. Nor could the subsequent proceedings under the attachment destroy the right if asserted before the goods were actually sold and dispersed under the order of the chancellor, and the proceeds appropriated by the decree. A contrary determination would enable any creditor to gain priority by attaching the goods at any stage of their transit; which would be inconsistent not only with the conclusion previously stated as to the effect of an attachment upon the right of stoppage *in transitu*, but with the principles on which the right is founded, viz: 'That it is held to be unreasonable to allow the goods of a vendor to be appropriated to the payment of other creditors of the vendee, who fails before payment and before the goods have

actually reached him.' It seems that some of the goods had been sold under the order of the chancellor, before the complainants filed their bill and perhaps before they made any demand. The sale was made for the benefit of all concerned; and before any appropriation of the proceeds, or any adjudication upon the rights of any of the parties, the complainants asserted their rights to the subject. Under these circumstances, the conversion of the goods into money should not be considered as affecting in any degree the relative rights of the claimants, but the proceeds should be held subject to the same rights, and in the same order, as the goods themselves would have been had they been retained in specie. It was not the intention, and could not properly be the effect of the sale any more than of the attachment itself, to displace pre-existing rights. The power of the chancellor to enforce the right of stoppage *in transitu* has been admitted by this Court in the case of *Ford v. Sproule*, 2 Marsh. 528, and is, we think, unquestionable. The right is of equitable origin * *. But, whatever might be thought of the general question of jurisdiction, the goods in relation to which the right is now asserted being in the custody and under the control of the chancellor, and a part of them having been sold by his order, before the right was asserted, there seems to have been a peculiar propriety in resorting to the same tribunal for the assertion and enforcement of the right."

The law of Maryland is the same; a resort to the funds produced by the sale of the goods taken under process during the *transitus* being considered a sufficient assertion of the vendor's right. In *O'Brien v. Norris* (1), the Court said, "If the right of stoppage *in transitu* existed in the appellees at the time the attachment was laid and when their claim was filed, then, in the judgment of this Court, their right could not be defeated or impaired by the attachment. * *. Nor could the rights of the parties be altered by the sale of the goods under the Court's order. * *. Being of opinion that the filing of the claim to the fund in court

(1) 16 Md. 122.

by the appellees in this case was a sufficient exercise of the right of stoppage *in transitu*, if such a right existed, it remains only to examine whether under the facts and circumstances enumerated in the appellees' prayer, they were, entitled to exercise such right."

We acknowledge having been tedious in quoting so largely from the cases which have rewarded our search; but, at the risk of being more so, we shall point to the divergent opinions in England and the United States, as to the effect of an assignment by the vendee for the benefit of creditors. It is stated in Benjamin on Sales (*m*), that the bankruptcy of the buyer not being in law a rescission of the contract, and the assignees being vested with all his rights, the delivery of the goods into the buyer's warehouse after his bankruptcy, or an actual possession of them taken by his assignees, will suffice to put an end to the *transitus*, and to determine the right of stoppage. Reference is made to *Ellis v. Hunt* (*n*); *Tooke v. Hollingworth* (*o*); *Scott v. Pettit* (*p*); and *Inglis v. Usherwood* (*q*). In *Ellis v. Hunt*, the assignee made his mark upon the goods after the assignment to him, he being unable to remove them at the time, as they were *in custodia legis* under an attachment against the vendee at the suit of a creditor. The attachment was subsequently withdrawn and it was held that the goods were the assignee's as against the vendor, who claimed them four days afterwards, but as soon as he heard of the insolvency of the vendee. Kenyon, C. J., said, "The goods were no longer *in transitu*; they were then in the possession of the party to whom they were consigned or of those who represented him." Buller, J., said, "In this case there is the strongest evidence of the consignees taking actual possession of the goods by his assignee putting his mark on them. It was said by the plaintiff's counsel that the carrier would have been liable in an action by the vendor; but he would not have been liable in the character of carrier, for the goods had got to the end of their destined journey; he would have been liable only as a warehouse-keeper in

(*m*) § 858.

(*n*) 3 T. R. 467.

(*o*) 5 T. R. 215.

(*p*) 3 B. & P. 469.

(*q*) 1 East 515.

respect of the recompense which he was to receive for a warehouseman. But the instant the provisional assignee put his mark on the goods the warehouseman became the agent or servant to the bankrupt." And Grose, J., said, "It is stated as a fact that before this letter arrived the provisional assignee had put his mark upon the case; and this distinguishes it from the cases cited. When the goods were marked, they were delivered to the consignee as far as the circumstances of the case would permit; the assignee could not then take them away because they were at that time under an attachment. After the mark was put on them they were no longer *in transitu*, and consequently the plaintiff's right to seize them was divested."

It is not stated in the case whether the goods were specifically described in the assignment, or whether they were included in general terms. It would seem from the report that they had been in some way pointed out to the assignee as goods which were intended to pass under the assignment. Such a specification of the goods by the bankrupt, followed by a taking possession thereof by the assignee, might be well said to be such a specific disposition of the goods by the vendee as ended the *transitus*. But the independent action of the assignee following a general assignment, without a specific appropriation of the goods for the benefit of his creditors by the bankrupt, ought not to place the vendor in a worse position than the action of a single creditor under process of attachment.

In the United States an entirely different view is taken of the assignee's right. A sale of the goods by the vendee to a *bona fide* purchaser without notice, admittedly defeats the vendor's right. But in *Harris v. Hunt* (r) it was expressly held that an assignee for the benefit of creditors is not a purchaser for value without notice, and cannot, by taking possession of the goods, divest the vendor of his right of stoppage *in transitu*. This holding seems to be quite in harmony with the American view of the law as laid down in the cases where intervening process has been held not to divest the plaintiff of his lien.

(r) 17 N.Y. 249.

DELEGATION OF LEGISLATIVE FUNCTIONS AND DISALLOWANCE.

In discussing the subject matter of *The Thrasher Case*, we referred briefly to a subject which arose incidentally in that case (a), and which, clad in the cunningly conceived and craftily constructed garb of the delusive phrase which forms part of the caption of this article, stalks about among us a living, moving, principle of law; and we hinted that we hoped on a future occasion to dwell more at large upon the important questions involved in it than we were able to do then.

Many things have prevented the fulfilment of the hopes we then entertained; but a point has suggested itself which seems to have such an important bearing on the matter that we submit it by itself, seasoned with a little advocacy, to the thoughtful consideration of our readers.

We use the phrase "Delegation of Legislative Functions" for want of a better one, and to avoid a periphrasis. It is admittedly not a delegation of powers which is imported by the British North America Act; but the legislative bodies which owe their existence to that act, when acting within the limits therein assigned to them, are not (to use the expressions in *Regina v. Burah*), in any sense the agents or delegates of the Imperial Parliament, but have, and were intended to have, plenary powers of legislation, as large and of the same nature as those of Parliament itself (b).

The Legislatures of Canada are therefore not acting for the Imperial Parliament in making laws, i.e., the acts of those bodies are not the acts of the Imperial Parliament, enacted by it and in its name but through the instrument-

(a) 2 C. L. T. p. 575.

(b) L. R. 3 App. Ca. 889.

ality of its plenipotentiaries, but they are enacting their own laws in their own names, though deriving authority to do so from the Imperial Parliament.

This position is unhesitatingly assumed in *Regina v. Hodge (c)*, and stoutly insisted upon. Mr. Justice Burton says, at page 278, "It would seem almost a misapplication of terms to refer to the Provincial Legislature, as exercising a delegated authority in the sense of being an agent or delegate of the Imperial Parliament." His Lordship then proceeds to speak of the undoubted power of the Imperial Parliament still to make the laws which the Provincial Legislatures are empowered to enact, as corroborating this view. And after referring again to the powers of the Legislatures, he proceeds to say, "If these are powers which the Imperial Parliament could have delegated, then they can equally be so delegated by the Legislature of our own Province; if not, then it is unnecessary to add that they cannot be so dealt with by a Provincial Legislature."

Without any desire to carp at his Lordship's mode of reasoning, we must confess to a feeling that the conclusion is not justified. The idea of a delegated power had just undergone exorcism at the hands of the learned Judge, and yet, without retaining that idea as a correct one, the above conclusion must fail either for want of expression, or, by reason of its expression, for want of application.

We think we correctly interpret his Lordship's meaning as follows :—The Imperial Parliament has power to make all the laws enumerated in section 92 of the British North America Act. Having power to make them, it has power to delegate the making of them to the Provincial Legislatures. The Provincial Legislatures thus becoming possessed of the power to make these laws, in as full and ample a manner as the Imperial Parliament could do, they in turn have also the power to delegate the making of them to their nominees.

This appears to us to be fallacious. It imports that to the power of making a law is impliedly attached the power to authorize another to make the law. In other words the

power to pass laws includes *ex vi termini* the power to establish a law making body.

The degree to which this may be carried, if it does not show it to be unsound, at least shows it to be dangerous. The so called delegation may be carried on *ad infinitum*. The Province may delegate its legislative functions to the municipalities—the municipalities, to their mayors and reeves—and the mayors and reeves, to whom they please—each delegate claiming the right to hand down its powers, because its own title to those powers itself depends upon the acknowledgment of that right in its grantor—or because the power to enact a law theoretically includes the power to establish another body to make the law.

Again, the right of the Provincial Legislatures thus to exercise their powers being conceded without any qualification, it is a necessary consequence that they can select their nominees, just as did the Imperial Parliament. Hence they may abdicate their functions in favour of the Federal Parliament with perfect propriety, and on the other hand may receive from the Federal Parliament the power to pass Federal laws in the Provinces—a proposition most astounding.

The truth seems to lie in the doctrine of *Regina v. Burah*, that there is no delegation, either in name or in fact, but that the appointment of a subordinate legislative body is the creation of a constitutional body with power to make, *i. e.*, to originate, laws. If that be so—and it is the accepted doctrine in *Regina v. Hodge*—then the question assumes an entirely different form. It is no longer the question, as framed by the Court of Appeal, whether or not the Imperial Parliament, having the power to make certain given laws and having authorized another body to make them instead, that other body could in like manner depute the making of the same laws to still another body. But the question is, upon what authority, or by virtue of what power, does the Imperial Parliament invest a subordinate legislature with power to make any laws at all. Whence originates the power to say, “There shall be one Parliament

for Canada" (d)? Whence the power to say, "There shall be a legislature for Ontario" (e)? Out of the power to erect a law-making body, to grant a constitution, springs the power to authorize particular or given laws to be enacted. The power to originate a law-making body is the primary consideration—a secondary matter is the distribution or limitation of its legislative powers.

The first question to be asked then is, "Can the Imperial Parliament grant a constitution to Canada, out of which shall originate laws?" That being answered affirmatively, then the limitation of the legislative powers which depends upon the right to grant them is immaterial to the enquiry. The question must assume the same form when the powers of the subordinate legislatures are considered. We cannot solve the problem by asking simply, have these legislatures power to make a given law, and on receiving an affirmative answer, asking further, have they not then the power to depute another body to make the same law. That is the secondary consideration, and it depends upon the primary question, have they power to originate a law-making body? If so, then the limitation of the powers of the body so created, its special authority to make given laws, or its general authority to make any laws, is immaterial, as long as the Legislature may bestow upon it law-making powers in any degree.

We must then ask the same question concerning the Provincial Legislatures that we asked concerning the Imperial Parliament, namely, whence originates the power to say, "There shall be a Board of License Commissioners, etc.," and "the License Commissioners may pass resolutions, etc.," and "The Board may impose penalties for the infraction thereof" (f)? Or (changing the expression) whence originates the power to say, "There shall be a law-making body for each County, etc., to make laws for the regulation of the liquor traffic?" Or (changing the expression again) whence the power to say at all there shall be a law-making

(d) B. N. A. Act, sec. 17.

(e) B. N. A. Act, sec. 69.

(f) R. S. O. cap. 181, ss. 3, 4 and 5, in question in *Regina v. Hodge*.

body—a Legislature—with either restricted or general powers for any county? The answer, if in the affirmative, must rest upon either one of two reasons. It must be either because of the inherent sovereignty or supremacy of the Provincial Legislatures, or because at their creation that power was included in the limits assigned to them. We look in vain through the whole of the Charter of Confederation for any indication of an intention that such a power should be exercised. The Provincial Legislatures can only legislate within limits; if those limits fall short of including the power to establish another law-making body, then that power does not exist. It is, therefore, plain that if it can be exercised at all it is not because it was expressly granted to them. It must rest upon the first ground, namely, their inherent sovereignty or supremacy.

It is affirmed in *Regina v. Hodge* that the Provincial Legislatures have a measure of sovereignty or supremacy. But how can they be supreme when their powers are limited? The answer is given, they are supreme over their own subjects of legislation. Says Mr. Justice Burton, "The Provincial Legislatures, as I have shown, *within their respective spheres*, are absolutely supreme" (g). But says Austin, on the contrary, "Supreme power limited by positive law, is a flat contradiction in terms" (h). And again says Austin, "Let us suppose, for example, that a viceroy obeys habitually the author of his delegated powers, and, to render the example complete, let us suppose that the viceroy receives habitual obedience from the generality or bulk of the persons who inhabit his province. Now though he commands habitually within the limits of his province, and receives habitual obedience from the generality or bulk of its inhabitants, the viceroy is not sovereign within the limits of his province, nor are he and its inhabitants an independent political society. The viceroy, and (through the viceroy) the generality or bulk of its inhabitants, are habitually obedient or submissive to the sovereign of a larger society. He and the inhabitants of his province are, therefore, in a

(g) 7 App. R. at p. 276.

(h) Lectures on Jurisprudence, p. 270.

state of subjection to the sovereign of that larger society" (i). If we substitute the necessary terms and expressions applicable to a legislature for those of viceroy and its attendant expressions, we must come to the conclusion that a legislature which habitually obeys the author of its delegated powers (as the Canadian Legislatures do whenever they act within the limits assigned by the British North America Act) though it makes the laws within the limits assigned to it is not sovereign within those limits. Both the legislative body itself and those for whom it makes the laws are habitually obedient, or submissive, or in a state of subjection, to the sovereign power of the larger society of which they form but a member.

But admitting for the sake of argument that it can be true that the legislatures are sovereign or supreme within the limits assigned to them. If this *can* be true, is it true?

We contend that it is not true, for two reasons appearing on the charter. The one is because the power of the Imperial Parliament still exists, to pass the same laws for the Province that the Provincial Legislatures are empowered to pass; and therefore these bodies are not either in theory or in fact supreme within their limits. When it is said that this paramount power of the Imperial Parliament exists only in name, that is begging the question. If it does exist in name, then the supremacy of the subordinate body does not exist in name. How much less then can it exist in deed!

The other reason why the supremacy of these bodies does not exist, brings us at last to the point at which we have been aiming, and is this, that though all legislation in Canada may be strictly within the actual limits assigned to it, it is yet subject to an absolutely discretionary power of disallowance. That this power over legislation actually exists, and that it is occasionally exercised as a fact, a list of disallowed acts is sufficient evidence of. And that it does in fact exist, and that it is in fact exercised, most effectually disposes of the assertion that the law making

(i) Ibid. p. 230.

bodies are supreme within their respective spheres, and that the supremacy of their immediate superiors exists but in name.

Since the absolute power of disallowance without doubt exists in Her Majesty over the legislation of the Federal Parliament, and in the Governor-General over that of the Provincial Legislatures, we are now to enquire how it affects the question of so-called delegation of their powers.

The power to disallow acts of the several legislatures was evidently reserved for a purpose, that purpose being that a direct supervision might be had over all Federal and Provincial Legislation, accompanied by the very necessary power to check ill advised law-making by disallowing such acts as it might be thought prudent not to permit to pass into law.

If the power existed in the Canadian legislatures of erecting subordinate law-making bodies, the acts, rules, by-laws, resolutions, or whatever they may be, of those subordinate bodies would be beyond the reach of the disallowing power. Take an instance. It is the province of the Federal Parliament to make laws respecting criminal procedure. By the Act 32-33 Vict. cap. 29, sec. 44 (D) every person qualified and summoned as a general juror or petit juror in criminal cases according to the laws which may then be in force in any province of Canada, shall be and shall be held to be qualified to serve in that Province, whether such were laws passed before or be passed after the coming into force of the British North America Act, 1867,—subject always to any provision in any Act of the Parliament of Canada, and in so far as such laws are not inconsistent with any such act. This enactment has been held to be *intra vires* (j). Hagarty, C. J., says, "This need not be read as technically a delegation of their own authority, but rather, in the language of Wilson, C. J., an acceptance of the Provincial law, and a legislation by relation and reference to that law." It makes but little difference whether it be considered an attempt at delegation

(j) *Regina v. O'Rourke*, 1 Ont. R. 464.

or an adoption of existing measures. When the Imperial Parliament declared that the Parliament of Canada should make the criminal laws, it evidently intended that it should make them, and that they should not be made by the Provincial Legislatures. How then can the Parliament of Canada, under the guise of delegation of their powers, authorize the legislatures to do what the Imperial Parliament has prohibited them from doing? This is true for two reasons, first, because it would be a breach of the British North America Act, and secondly, because the Imperial Parliament by that act lodged in Her Majesty the discretionary supervision of the criminal laws of Canada, with power to disallow whatever might not be considered a prudent enactment. An endeavor by the Federal Parliament to place the making of criminal laws in the hands of the Provincial legislatures would be an attempt to wrench from the Crown the power of disallowing legislation in criminal matters—the laws originating in the Provinces not being subject to review by Her Majesty.

The argument against the adoption of Provincial measures in like cases is even stronger. Besides the argument adduced as to the deprivation of the power of disallowance, there is this further argument. The Provincial legislatures have no power to make criminal laws by the British North America Act. That power cannot be granted to them by the Federal Parliament. Not having any power to make such laws, any attempt to do so is vain. Their action is void *ab initio*; the result is not an act, is not legislation, must be considered as non-existent, and therefore cannot be validated by adoption. *Debile fundamentum fallit opus.*

Suppose that the Provincial Legislatures should (acting upon the authority and effect of a Federal Act such as above quoted) pass a measure declaring that all persons charged with any crime should be tried by a jury of five, or that they should be tried as at present, and that a majority of the jury should be sufficient to convict. According to the case of *Regina v. O'Rourke*, this would be a valid law. The Governor-General might be content with

such an enactment, which would therefore remain on the statute book. Being a Provincial measure subject only to review by the Governor-General, Her Majesty could not if so advised exercise her undoubted right of disallowing what would clearly be a measure relating to criminal matters.

It is no answer to the criticism on *O'Rourke's Case* to say that the original Act, 32-33 Vict. cap. 29, might have been disallowed. It was not disallowed and cannot now be disallowed.

We might take also, as an instance of the effect of importing this doctrine into the constitution, the Act respecting Licenses and License commissioners which came in question in *Regina v. Hodge (supra)*. The same remarks will apply to that case. The placing in the hands of License commissioners of the power to make resolutions or laws, and to impose penalties for their infraction, and the subsequent passage or enactment of such resolutions and imposition of penalties for their infraction, cheats the Governor-General of his undoubted right to disallow any laws of the Province. Disallowance of the original Act is out of the question, for the time for disallowance is past.

The consequences of carrying out the delegation doctrine to its full extent need not be dilated upon, for they are too evident. It may clearly be made totally destructive of the power of disallowance which is so plainly created by the British North America Act, and that being so, it is most worthy of consideration whether for that reason alone it should not be declared to have no place in our constitution, either in theory or in fact.

WAYS OF CONVENIENCE.

We discussed not long ago the subject of Ways of Necessity by implied grant (*a*), and by implied reservation exception or re-grant (*b*). There is a further class of rights, which arise by implication upon a grant being made of land, which the grantor is estopped from disputing, and which may, for want of a better term, be designated by the caption of this paper. Though not absolutely necessary for the enjoyment of the property, they yet contribute to the fulness of that enjoyment, and without them the property would be depreciated in value. We propose to adduce some instances of these ways by the citation of various cases which elucidate the principles upon which they exist.

It is an admitted principle that where one purchases land on the faith of a representation that a lane or way is used or enjoyed therewith, the grantor will not be permitted to close up the lane.

In *Adams v. Loughman* (*c*), B., owning land in fee simple, conveyed a portion of it, on which were two houses, describing the premises as houses numbers 112 and 114 "and the appurtenances thereof," and also by metes and bounds. One of the courses extended westerly "to a lane produced six feet wide, then south * * along the said lane, etc." This lane then existed on B.'s land, and was used as a means of access to the houses conveyed; and it was represented to the grantee that the lane was laid out for the use of the land conveyed, on the faith of which the defendant purchased. It was held that the defendant was entitled to relief against B. or any one claiming under him for any interference with the lane.

(*a*) Ante p. 12.

(*b*) Ante p. 127.

(*c*) 39 U. C. R. 247.

This case followed *Rossin v. Walker* (d), where building lots were sold according to a plan which showed upon it certain streets, lanes, and open spaces. The plaintiffs and defendants both claimed under the original owner, who had laid out the land as shown upon the plan. An attempt was made by the defendants to close up a strip of land or a lane adjoining the plaintiffs' land by building upon it. A perpetual injunction was awarded to the plaintiffs, restraining the defendants from so building. Esten, V.C., in giving judgment, said, "It is a point of considerable importance to determine the extent to which owners of property exhibiting maps and plans on the sale of property are bound by their contents; and we have decided in this Court that when a map or plan is exhibited as a particular of sale, presenting on its face roads, streets, squares, and other advantages and attractions, and purchases are made according to and on the faith of it, he cannot afterwards divert the grounds appropriated to such uses to other purposes, although he may not be bound to make or construct all the roads, streets and squares, and other things of the same sort which the map exhibits."

The same proposition has been unequivocally enunciated by Burton, J.A., in *Re Morton and St. Thomas* (e), who is reported to have said, "No one would think of disputing the proposition that if a person sells lots according to a particular map or plan, the purchasers acquire an interest in the streets or lanes shown upon the plan adjoining the lots sold, which places them beyond the vendor's future control to their injury."

So in *Espley v. Wilkes* (f), Kelly, C.B., says, "If you (the lessor) had told me in your lease this piece of land abuts on the road, you cannot be allowed to say that the land on which it abuts is not a road." In that case the description contained in the lease was "all that plot of land bounded on the east and north by newly made streets * * * a plan whereof is indorsed on these presents."

(d) 6 Gr. 619.

(e) 6 App. R. 323.

(f) L. R. 7 Ex. 303.

The sites of these new streets were marked on the plan "New Streets"; there was a covenant by the lessee (the defendant) "to kerb the causeways adjoining the said land." The lessor afterwards granted to the plaintiff a lease of the land which appeared on the plan as the site of one of the proposed new streets, and which had in fact never been made into a street. The plaintiff enclosed the land so that the defendant was unable to reach the street on the east side of his land. It was held that a right of way, along the site of the proposed new street, had passed by implication to the defendant, with the land comprised in his lease.

What is a sufficient evidence of the intention of the grantor may sometimes be a matter of doubt, but apparently anything amounting to a representation relied on or acted on is sufficient.

In *Wood v. Stourbridge (g)*, P., the owner in fee of an estate, having sunk a shaft for working coals thereunder, staked and set out a road across the estate from a public highway on the west to the colliery, and thence to the east to another public highway. The road from the west to the colliery was made, but that portion leading from the colliery to the east was only staked out, when P. agreed with A. to sell to him a piece of land, which was described in the conveyance as being "bounded on the north by the road leading to the said P.'s colliery . . . together with the free use and enjoyment by A., his heirs, etc., of the above mentioned road, leading to the said colliery at all times and on all occasions, he and they contributing a proportionate part of the expense of keeping such road in repair." Notwithstanding the description of the way as leading to the colliery, it was held that the grantor and those claiming under him had the right to go beyond the colliery, over the whole length of the road to the east, and that although the easterly part had only been staked out.

Erle, C.J., said, "To my mind, when a road is staked out for the purpose of passage, it is as much a road as if properly formed and made with granite or flint."

Willes, J., said, "With reference to a private road, the only definition you can give of it is a strip of land appropriated to the purpose of passage from one point to another; nothing more is necessary to make a private way. If appropriated throughout its whole length, though not formed, it is still a way."

Though the vendor or grantor will not be allowed to close up streets or lanes of the kind in question he will not on the other hand be compelled to complete them, though his intention to do so may be plainly and unequivocally expressed in his conveyance or elsewhere.

In *Cheney v. Cameron (h)*, a suit for specific performance by the vendor was defended on the grounds that certain proposed improvements had not been completed. Esten, V.C., said, "This is one of those cases in which a plan has been exhibited as a particular of sale, representing the different lots with roads and other proposed improvements; we have decided that when a plan of this kind has been used for such a purpose, the vendor will not be permitted to divert the ground appropriated for roads for any other purpose, but we are not aware of any case in which it has been decided that such a use of a plan imposes on him the obligation of constructing such roads." And Spragge, V.C., to the like effect. "I think there was no express agreement to make roads * * and I think the mere exhibition of a plan upon which lots and streets are delineated, is not itself an agreement, or the holding out of an expectation that the roads will be actually constructed at the expense of the vendor."

There is a marked distinction between a representation and a mere intention. Just as the grantor is not bound to carry out his intention of constructing streets and roads, so neither is he bound to carry out his expressed intention in other respects. He may indeed relinquish his original intention, and deal with the proposed streets and roads otherwise than as originally expressed, so long as no damage is done to those entitled to use the way.

(h) 6 Gr. 623.

In *Harding v. Wilson* (i), a lease of premises was granted to B. wherein they were described as abutting on "an intended way of thirty feet wide." When the lease was made the road had not been set out. For about four years before the defendant who purchased from the lessor committed the trespass complained of, there had been a road thirty feet wide which answered the description in the lease. The defendant after acquiring the soil of the way built a wall thereon, leaving a road only twenty-seven feet in width opposite the plaintiff's house. It appeared by the evidence that the road so left was as wide as convenience required, and that the plaintiff had sustained no inconvenience from the erection of the wall. It was held that a *convenient* way only was all that the plaintiff could claim. Abbott, C.J., said, "Adverting to the lease * * * the former does not grant a way thirty feet wide, but only describes the land demised as bounded by an intended way of that width. This is merely an expression and declaration of an intention. If, indeed, that operated as a grant, the plaintiff's right might possibly have been made out; but if it was not a grant, a departure from the intention expressed will not give a right of action unless some actual damage has been sustained."

Bayley, J., is even more explicit. "In this case there was not any express stipulation as to the width of the way, but the abuttal was described as an intended way thirty feet wide. That was merely the intention of the owner of the soil. He does not expressly engage that the road shall be of that width. It was his intention to make it so at the time; but he uses no words which could fetter his intention, and prevent a deviation from it, provided a convenient way was left for B. and his under-lessees."

And Holroyd, J., says, "The intended way is no part of that which was granted; and the declaration of an intention is not an implied grant."

(i) 2 B. & C. 96.

EDITORIAL REVIEW.

Non-Suits in the Chancery Division.

The favourite pastime of counsel for the defence in actions in the Chancery Division is moving for a non-suit at the close of the plaintiff's case. In one case at the present sittings at Toronto a motion for a non-suit was argued for two days, and the learned Judge reserved judgment. Bearing in mind the true meaning of non-suiting the plaintiff, we can hardly conceive how a learned Judge can hear argument and reserve his opinion as to whether he ought to withdraw the case from himself on the ground that there is no evidence for him to consider. The fact is, that such a proceeding as the so-called moving for a non-suit in a trial before a Judge without a jury, is in fact arguing the case on the plaintiff's evidence alone at the defendant's risk. The distinction is pointed out in *Macdonald v. Worthington*, 7 App. R. at p. 564, where Patterson, J. A., says:—"It is based upon an assumed analogy between the dismissal of the plaintiff's bill by the learned Judge on the trial, and the entry of a non-suit, when in the opinion of the Judge there is no evidence to leave to the jury in support of the plaintiff's case. If the Court *in banc* thinks the non-suit improper, a new trial follows of necessity, because the evidence has been withdrawn from the tribunal whose office it was to pronounce upon it, and to find the facts. When a Judge tries a case without a jury the position is very different. He has to decide upon the facts as well as the law, and his decision upon the facts is subject to review by a Court which has the power, not merely to say he was wrong, but to give the judgment he ought to have given. * * The Judge decides that the evidence is insufficient to prove the issue. His conclusion may be arrived at after balancing the evidence as a jury is

supposed to do, or he may be so fully satisfied that the evidence is all one way, that, if he were trying the case with a jury, he would say there was no evidence fit to submit to them. In either case he is deciding upon the evidence, and his decision may be mistaken and may be overruled. * * The analogy to the non-suit does not hold in any particular, and the principle relied on for the defendant cannot be admitted to exist." This seems to place the matter upon its proper foundation, and to dispose of a practice which would give the defendant and his witnesses the benefit of hearing all that could be said for the plaintiff before commencing the defence.

While writing of non-suits we are reminded of an original method of extricating himself from a difficulty which the late lamented learned Judge of the County Court of York once adopted, and which we think is without a parallel in the annals of the Courts. Counsel for the defence moved for a non-suit at the close of the plaintiff's case. Counsel for the plaintiff insisted that there was evidence to go to the jury. The learned Judge could not say whether there was or not, but said he would leave it to the jury to say. The motion for a non-suit was then argued before the jury, who thought that there was evidence to go to them, and so told his Honour. The learned Judge then ruled that there was evidence to go to the jury, and the defence was entered upon. What would his Honour have done if he had been without a jury to aid him in his dilemma !

Touting for Business.

We have lately received several communications from practitioners outside of Toronto, who, while striving to keep themselves in the strait way and make a decent living, are not only constantly harassed by the depredations made upon their legitimate sphere of business by unprofessional men, but are also subjected to the unfair competition of their professional brothers who supply want of learning and skill by impudence and advertising.

A certain gentleman, resident in this metropolis, professing a great deal of law, and practising but little of it, has

lately issued a circular in the following terms, and has sent one to every practitioner outside of Toronto :—

Head office— ———St., 2nd door north of ———St.
Branch office— ———ville, Ont.

—, —, ———
Barrister, Solicitor,
Notary Public, etc.

TORONTO, ONT., CANADA, 1883.

Dear Sir :

You will please find enclosed with this letter my card to both of which I beg leave specially to direct your attention. I am advised to communicate with you relative to the forming of some arrangements for securing your City Agency Law business, or a part thereof. I am anxious to obtain your Agency work if possible and can furnish if required, ample security and the best of references. I purpose making Agency business a specialty in my practice provided I can get sufficient to make it an object for me to do so. My experience for the varied work I am seeking is such, I think, as will guarantee efficiency. If you contemplate making a change of agents, or, having no regular city solicitor, feel disposed to give me a trial in transacting your legal business, kindly do me the honor of an early reply hereto.

I am,
Yours sincerely,

—, —, ———.

The only effect of this appeal, as far as we can learn from various enquiries, is that most of the recipients returned the documents to their Toronto agents for inspection.

Other attempts to secure business in a less tangible, though not more reputable form, are coming to light. A certain class of young men who profess that they are masters of many arts unknown to other practitioners, do not hesitate to call upon merchants and others, and solicit their business. They not unfrequently capture a client or two for the time being, and mayhap keep him until he is "solicited" by some other of the same *genus*. It is true that this free-booting style of practising will not work a very great deal of injury to any respectable solicitor's business, but what we have to complain of is that it makes the whole profession odious in the eyes of the public. It is an insidious disease and difficult, perhaps impossible, to cure.

Professional Attire.

Carelessness in dress is a growing evil at Osgoode Hall. We do not refer to the every day costume which members of

the Bar may choose to wear, but to a certain indifference to appearances which many affect when they don their robes.

The rules are explicit enough to be understood and easy enough to be observed if the will is so bent. We have blue serges, "pepper and salt" tweeds, blue-black broadcloth, and all sorts of other cloths which we do not know the names of, doing duty for the sober black coat and waistcoat which should invariably be worn in court. A young gentleman who would probably exhaust at least an hour in scraping his chin, tying the stiffest and whitest of starched cravats, and enveloping himself in the sleekest of "swallow-tails" for an evening party, will, without hesitation, pull out of his pocket, or bag, or the drawer of his locker, a stringy looking dirty white cravat, and tie it in a very unbecoming knot around his collar, cover as much of his tweed coat as he can by pinning his gown across it, and present himself in Court with the native brass beaming from his cheeks, while he trusts to the possible defective eyesight of the Judge to escape detection. If the same gentlemen were habitually careless in dress such conduct would perhaps be less noticeable; but where there is no such plea, it is a direct affront to the Court not to conform to the regulations. There is no excuse that is not easily disposed of. Lockers are provided in abundance at the Hall, where a black coat and waistcoat and a supply of clean white cravats can be kept, so that if any gentleman should be unexpectedly summoned into Court he would be able to appear properly dressed. It is not uncommon to say that as long as the Judges do not object, it is not the business of any one else. That is not so. The Judges, we are sure, do object; but it is an unpleasant thing for a Judge to reprove a Barrister for appearing in Court wearing a blue coat or a soiled cravat. Even if Judges do not speak of these things, self-respect ought to teach every member of the Bar what his proper course is.

Stamps on Promissory Notes.

The *Legal News* prints a report of a case of *Dickison v. Normandeau* (6 L. N. 136) in which Mr. Justice Taschereau

decided that the right of the holder in good faith to apply to the Court for leave to affix the required amount of stamps to a note on which suit is pending, is not affected (as to a note made before the repeal of the Stamp Act) by the Act 45 Vict. cap. 1, which repealed the Stamp Act.

The learned Editor refers to the case of *Bradley v. Bradley* (18 C. L. J. 438) decided by a Deputy of a County Judge in Ontario, in which it was held that after the repeal of the Stamp Act no promissory note made before the repeal and wanting stamps could be validated by affixing double stamps thereto, and remarks, "This decision, if it were well founded, appeared to disclose a very unfortunate oversight on the part of the Legislature. We are glad, however, to find that the law is not viewed in this light by a Judge of a Superior Court. * * It is satisfactory to find the judgment of a Superior Court of Law coinciding with the equity of the case, and carrying out the obvious intention of the Legislature."

It is easy to agree both with the learned Judge who decided *Dickison v. Normandeau*, and the learned Editor who comments upon that case. We would not have either of them think, however, that the judgment in *Bradley v. Bradley* is an index of either judicial or professional opinion in this Province upon the subject matter of the case. We believe the point came expressly before the learned Chief Justice of the Common Pleas at *nisi prius* not many months ago, and was decided by him without any hesitation, according to the only enlightened view that could be taken of it.

Recent Official Changes and Appointments.

Mr. J. S. Cartwright, late a clerk in the Surrogate office of the County of York, has been sworn in as Registrar of the Queen's Bench Division of the High Court of Justice, in the place of Mr. Winchester, who has been appointed Inspector of Public Offices. Mr. Gordon Brown, late editor of the *Globe* newspaper, succeeds the Hon. Wm. Cayley, who also retires from the Surrogate office, York.

BOOK REVIEW.

The Law and Practice relating to the administration of the estates of deceased persons by the Chancery Division of the High Court of Justice, with an appendix of orders and forms, annotated by references to the text. By W. GREGORY WALKER, B. A., author of "The Partition Acts, 1868 and 1879; a manual of the law of partition and of sale in lieu of Partition," "A compendium of the law of executors and administrators," and EDGAR J. ELGOOD, B.C.L., M. A., both of Lincoln's Inn, Barristers-at-Law, and late scholars of Exeter College, Oxford. London: Stevens and Haynes, 1883.

If we omit that part of this excellent little work, which relates purely to the machinery for carrying out the principles of administration, which is somewhat different from our practice, we may say that the book may be most profitably read by every one who has an administration matter to conduct. The work is not a mere outline of the practice, but the learned authors discuss who are the proper parties in respect of real and personal estate respectively, the preservation of property by ordering trust funds into Court, the consolidation of proceedings, the manner of proving claims, and so on; all of which include a good deal of substantive law.

A new feature displayed in this book is the table of cases which contains a reference to every series of reports in which a case is reported.

REVIEW OF EXCHANGES.

Albany Law Journal.—20th January, 1883.

Interlopers on Railways. Two recent Indiana cases are noticed. In *Everhart v. Terre Haute &c.* 78, Ind. 292, at the request of a railway employee, the plaintiff, a stranger, got on a slowly moving car on a switch and applied the brake, and while so occupied was injured by a collision with other cars, negligently produced by other servants of the company. Held that he had no action against the company. In *Lary v. Cleveland, etc.*, 78 Ind. 323, the plaintiff went into a freight shed for his own amusement, and was struck by a fragment of the building blown off in a storm. Held no action.

Ibid.—29th January, 1883.

Common Words and Phrases. The following are construed:—Habitual drunkenness; Lumber; Internal improvement; Goods, wares and merchandise; Means; Crew; Coffee-house; Head of a family; Earnings; Repair; Necessaries; Missionary purposes; Change of grade; Disorderly house—Gaming.

Rules relating to Opinion Evidence, by JOHN D. LAWSON. As to Physicians, Surgeons and Disease, the learned writer gives the following rules. Rule 4. The law does not recognize to the exclusion of others any particular school of medicine or class of practitioners. Rule 5. To give an opinion on medical questions, one may be qualified by (a) study without practice, or (b) by practice without study. Nor is it absolutely necessary (c) that he should be a physician or have studied for one. Rule 6. The opinion of a medical man is competent as to matters which he has not made a specialty in his study or practice. Rule 7. A medical man is not disqualified to give an opinion because (a) he is not a graduate of a college and does not possess a license to practice, or (b) is not at the time in practice or (c) because a case exactly like the one in question has never been seen or read of by him before.

Ibid.—3rd February, 1883.

Nuisance of Noxious Trades. A number of cases bearing upon this subject are cited.

Ibid.—17th February, 1883.

Rules Relating to Opinion Evidence, by JOHN D. LAWSON. Rule 8. One not an expert may give an opinion, founded upon observation, that a certain person, is sane or insane.

Ibid.—24th February, 1883.

Common Words and Phrases. The following are construed. Open and public places; Billiards; Disabled from sitting; Family groceries; Gift enterprise; Fulfilled—performed; Close; Merchantable; Expenses of the family.

Rules Relating to Opinion Evidence, by JOHN D. LAWSON. Rule 9. On a question of insanity, the non-expert must first state the facts observed by him, and on which his opinion is based. Rule 10. But an expert may give an opinion, based either on his acquaintance with a party whose mental or physical condition is under investigation, or upon a medical examination of him which he has made, or upon a hypothetical case stated to him in court. Rule 11. The opinions of both experts and non-experts should have weight according to their opportunities and qualifications. Rule 12. The qualifications of a witness to testify as an expert are to be decided by the trial court. Rule 13. The jury are not bound by the opinions of medical experts.

Ibid.—17th March, 1883.

Common Words and Phrases. Continued in the following number. The following are construed: Disorderly persons and gamblers; Force for extinguishing fires; Letter; Medicine and drugs; Timber; Concealment; Subvert; Misfeasance in office; Good health; Will steal; Quick despatch; Poor person; Road; Tributary; Additional insurance; Ordinary stage of water; Against consent; Device; Inland waters; Endanger; Inhabited dwelling house; Navigated; Person; Seaman; Necessaries; Accomplice; Like character; Payable on time.

Ibid.—24th March, 1883.

Icy Sidewalks, by ADDISON G. MCKEAN. "Whether an accumulation of ice or snow upon a sidewalk constitutes a defect for which a city will be liable to one injured thereby, is not well settled." American cases are cited. The above remark will hardly apply to our law.

Ibid.—3rd March, 1883.

Liability for loss from negligent fires. The law of New York is stated. The question received judicial consideration lately in our Court of Appeal, in *Furlong v. Carroll*, 7 App. R. 145; 2 C. L. T. 207.

Withdrawal of Offer to Sell, by SYLVAN DREY. Sir William Anson's inference from *Cooke v. Oxley*, 3 T. R. 653, and *Dickinson v. Dodds*, L. R. 2 Ch. Div. 463, is criticised, so far as he states that a withdrawal before acceptance need not be notified to the opposite party where the proposed contracting parties are in direct communication. He concludes as follows:—"The rule therefore is well settled in England that an offer cannot be retracted without notice to the other party. The only problem which remains yet to be solved is what will constitute a sufficient notice of withdrawal in law? As we have already pointed out, *Dickinson v. Dodds*

decides what sort of notice would be sufficient under certain peculiar circumstances, but it lays down no general rules."

American Law Register.—February, 1883.

Is the Jury System a Failure ? by HENRY A. HARMAN. A strong plea in favour of retaining trial by jury, in answer to a proposal to abolish it contained in an article in *The Century Magazine*. The learned writer shows conclusively to us that the proposed tribunal of seven trained judges to pass both upon fact and law would not be a success, to say nothing of their inability to do all the work.

Warranties Implied in Sales of Personal Property in the United States and Canada, by ARTHUR BIDDLE, continued and concluded in the two following numbers. A review of American cases upon the subject, with some Ontario cases. The subject is treated under the following heads:—1. The implied warranty of title. (a) Sales, (b) Exchanges, (c) Sale of an interest in a chattel, (d) Sale by a judicial officer, (e) Distinction made between goods in, and not in, possession of vendors, (f) Proof of eviction or disturbance before action. 2. Implied condition of existence. 3. Sale of goods by description. (a) Sale of chattels, (b) Sale of negotiable instruments, prospectuses, etc, (c) Merchantability implied in sales of goods by description when not inspected by vendee. 4. Goods sold to order. 5. Sale of goods for special use. (a) Vendor's skill relied upon, (b) Implied warranty of soundness in sales of provisions. 7. Warranty implied from a usage in trade. 8. Sale by sample. (a) General rule, (b) Production of sample not necessarily sale by sample, (c) Implied warranty of merchantability in a sale by sample.

Irish Law Times.—25th November, 1882.

Criminal Attempts. Continued and concluded in three following numbers. Reviews a number of English and American cases.

Ibid.—23rd December, 1882.

Contracts Impossible of Performance. Concluded in the following number. English, American and Canadian authorities are collected.

Ibid.—6th January, 1883.

Criminatory Attempts. Continued and concluded in two following numbers. Some remarks and cases upon the witness' right of objecting to answer and the manner in which the objection should be made. The competency of husband and wife to testify for and against each other is referred to.

Ibid.—27th January, 1883.

Solicitors Acting Professionally Against Former Clients. Continued and concluded in five following numbers. Counsel may draw the pleadings and advise on evidence on both sides if not retained by one; but will be restrained by injunction from divulging the secrets of a former client. A solicitor will not be restrained from acting for a client simply

on account of his having acted in the relationship of solicitor for another client with conflicting interests. Where a solicitor acts for a client in an action in which judgment is reserved, and another client who has a claim on the defendant in the action applies to him for advice as to enforcing his claim, it is the solicitor's duty not to act for the second client if by so doing he will be likely to injure the position of the first client, in case he recovers judgment in the action. After a review of some early cases, the learned writer says: A solicitor should not be restrained from acting professionally for a client simply on account of his having acted previously in the relationship of solicitor for another client with conflicting interests, but he should be so restrained only when the previous client would be unfairly prejudiced by his affairs being communicated. Where the client has discharged the solicitor without any misconduct on his part the cases are conflicting.

Law Journal—28th October, 1882.

Perpetuities Arising out of Contract. *The London, etc., Railway Co. v. Gowan*, 51 L. J. Ch. 530, is discussed. A Railway Co. sold surplus lands, taking a covenant from the purchaser to reconvey on six months' notice, on payment of a certain sum. The defendant purchased with notice of the covenant. The Court of Appeal held that the covenant could not be enforced, as it created a perpetuity in the Company.

Ibid.—4th November, 1882.

Excluding Counter Claims. A case of *Gray v. Webb*, reported in the November number of the *Law Journal* Reports is discussed. In an action of specific performance by the vendor, the defendant counter-claimed for a sum alleged to be due him by the vendor on another transaction, and the counter-claim was excluded. The learned writer remarks, "The real fact is that in cases of this kind, in which two persons have cross-claims against each other, it is a mere accident which one brings the action. * * The man who claims the most is naturally the one to put the law in motion; but, so far as the merits of the dispute were concerned, that fact is also accidental. The object of the law, as it seems to us, is to find out the point in dispute between the parties, and to decide it. This point cannot be discovered in many cases unless a counter-claim is employed; and the law fails in its purpose when the real gist of the dispute is shown to be an alleged counter-claim, and it declines to entertain the counter-claim."

Ibid.—16th December, 1882.

Contracts in Letters. Some general remarks as to contracts spelt out from letters, founded upon *May v. Thompson* reported in the December number of the *Law Journal* Reports.

The Authority of Auctioneers. An auctioneer who was selling a horse which was suffering from a discharge at the nostrils, assured the bidders that he would sell him as only having a cold. The horse had chronic glanders and the plaintiff's stable became infected. The auctioneer was not expressly authorized to warrant the horse, and it was held that judgment should go for the defendant.

Ibid.—23rd December, 1882.

Gifts by Infants. *Taylor v. Johnson*, reported in the December number of the *Law Journal Reports*, decides that an infant can make a good title to personalty by delivery.

Ibid.—30th December, 1882.

Restraining Libels by Injunction. A few remarks on a late case. It is pointed out that the Common Law Courts under the Common Law Procedure Act, 1854, possessed the power to restrain libels by injunction, but the exercise of the power was never demanded. "It is necessary, before a case for an injunction is made out, to show that the libel is at least likely to be repeated, if not that it is actually being repeated. * * The plaintiff must produce evidence that the libel is not true; it is not enough for him to make an affidavit that to the best of his belief the libel is not true, when the defendant in his turn makes affidavit that to the best of his belief the libel is true. Thirdly, if the occasion upon which the libel is issued is privileged, the question of injunction will be reserved until the trial."

Ibid.—13th January, 1883.

Leases and Agreements for Leases. In commenting on *Walsh v. Lonsdale*, reported in the January number of the *Law Journal Reports*, where it was said that there are no longer two estates, one at law a tenancy from year to year, and the other in equity under an agreement for a lease, the learned writer remarks, "A person agrees in writing (or perhaps to agree that he will agree in writing would be enough) to buy land. No conveyance is executed; but the purchaser goes into possession, and, so far as appears from the case under discussion, the equitable estate which he had in the land is by the Judicature Act transformed into a legal estate, and he can at once make a good title. It may quite as well be said that a man who has agreed to buy land has an equitable freehold in it as that a man who agrees to lease land has an equitable leasehold in it. * * Under the Judicature Acts equity is to prevail only when there is a 'conflict' between the rules of the common law and the rule of equity. The rule of the common law is plain—i. e., that an agreement for a lease followed by possession creates a tenancy from year to year. It is difficult to discover, from the judgment in *Walsh v. Lonsdale*, the rule of equity which conflicts with this."

Ibid.—20th January, 1883.

"Consideration" and "Description" in Bill of Sale. A promise by the grantee of a bill of sale that he would not register it, whereby he got a large bonus for his loan, was held not to be part of the consideration. *In re Storey, ex parte Popplewell*, reported in the January number of the *Law Journal Reports*.

Ibid.—27th January, 1883.

The "Ox" case. Referring to *Tillett v. Ward*, the now celebrated ox case, the learned writer says, "It is, for the present at all events, clear

law that no damages can be recovered for cattle straying from the high road, unless negligence can be brought home to the driver."

Ibid.—10th March, 1883.

Contracts on Terms not Read. A case of *Watkins v. Rymill*, reported in the March number of the *Law Journal* Reports, decides that a person signing a contract without taking the trouble to read it is bound by the terms of it. Some remarks are made and some cases cited.

Western Jurist.—February, 1883.

Powers of Officers and Agents of Corporations. ANONYMOUS. The powers of the chief officers of Corporation, the executive committee, and the individual stockholder without authority, are discussed at length.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 23RD MAY, 1883.]

TROTTER v. CHAMBERS.

Married woman—Separate property.

The plaintiff and her husband were married before 1859. In 1870 he, being free from debt, purchased land and had it conveyed to the plaintiff; and with the rents and profits thereof, with money raised by mortgage thereof, and with money borrowed from her sons, the plaintiff purchased the chattels in question herein, which were seized under execution against the husband.

Held, that the chattels were her separate property within the meaning of R. S. O. cap. 125, sec. 1, and free from the debts of her husband.

[26TH MAY, 1883.]

CANAVAN v. MEEK.

Sale of land—Assumption of mortgage by purchaser—Liability to pay off and protect vendor.

M. conveyed land to the plaintiff, subject to a mortgage to the T. & L. Co. for \$2,000, and one to C. for \$500, which the plaintiff covenanted to

pay, and to save M. harmless therefrom. The plaintiff then conveyed to the defendant, in consideration of " \$1,050 and assuming the payment of the mortgages " aforesaid. The defendant gave back a mortgage for the balance of purchase money. He went into possession and paid interest on the T. & L. Co.'s mortgage. Subsequently the defendant's mortgage was discharged, and a mortgage for \$1,850 was given by the defendant to the plaintiff, which included the amount of three promissory notes for \$350 and other items, besides the balance of the purchase money. There was no covenant for payment therein. The T. & L. Co.'s mortgage fell due, and was not paid, and the plaintiff paid C.'s mortgage of \$500.

Held, that the defendant was bound to pay off the T. & L. Co.'s mortgage, and relieve the land therefrom, and indemnify the plaintiff against it if personally liable thereon.

[26TH MAY, 1883.]

O'BRIEN v. CLARKSON.

Assignment in trust for creditors—Trustee's powers.

An assignment in trust for creditors contained a clause empowering the trustee " to collect, realize and sell in whole or in portions as he shall from time to time think proper, and in such manner whether by auction, tender, or private sale, as he shall from time to time think advisable and for such price and upon such terms and conditions as to price and payment of purchase money, and with or without security for the unpaid purchase money, if any, and otherwise in every respect as he the said Trustee shall think advisable with power to rescind any contract of sale and to buy in and re-sell for the purposes of the trusts without being responsible for any loss or deficiency on the re-sale."

Held, that the power to the trustee to sell on credit with or without security for the unpaid purchase money did not invalidate the assignment in the absence of design on the part of the debtor so to enable the trustee to unfairly delay the realization of the assets.

[ARMOUR, J., 16TH MAY, 1883.]

REGINA v. CLARK.

Conviction—House of ill-fame—Habitual frequenter.

Held, that a conviction under 32-33 Vict. cap. 32, sec. 2, s-s. 6, for being an *unlawful* instead of an *habitual* frequenter of a house of ill-fame, and which adjudged payment of costs which is unauthorized by the statute, must be quashed.

W. H. P. Clement, for the motion.

REGINA v. MALCOLM.

Trespass—Fair and reasonable supposition—C. S. U. C. cap. 105—25 Vict. cap. 22—Conviction—Certiorari.

The defendants were convicted of a trespass under C. S. U. C. cap. 105 as amended by 25 Vict. cap. 22. They appealed to the General Sessions for the County of Brant, which Court affirmed the conviction. The conviction was then brought into this Court, and a motion was made to quash it, on the ground of want of jurisdiction in the convicting Justice, inasmuch as it appeared by the evidence that the defendants acted under a fair and reasonable supposition that they had the right to do the act complained of within the meaning of the above statutes.

Held, that that was a fact to be adjudicated upon by the convicting Justice upon a due consideration of the evidence adduced, and, therefore, that a *certiorari* would not lie.

W. H. P. Clement, for the motion.

Aylesworth, contra.

[OSLER, J., MAY, 1883.]

ADAMS v. THE CORPORATION OF THE TOWNSHIP OF EAST WHITBY.

Closing travelled road—Other convenient access to roads—Onus of proof—Dedication.

The power of a municipal council to close up a road under section 504 of the Municipal Act, whereby any one is excluded from access to his lands, is a conditional one only, and if another convenient road is not already in existence, or is not opened by another by-law passed before the time fixed for closing the road, the by-law closing the road may be quashed.

The onus of shewing that another convenient road is open to the applicant is upon the corporation.

The corporation of East Whitby by by-law closed up an old travelled road, whereby the applicant was shut out from ingress to his lands except by a short road leading to the original road allowance, which was now for the first time opened. For some years prior to 1844 the short road was used as a private road for the convenience of persons going to one F.'s mills, brewery, and distillery. In 1844, F. conveyed the land on each side of it to his son and son-in-law, but no mention was made of it in the deeds. The wife of the purchaser from the son-in-law, while speaking to F. at one time about the title, as to which some dispute arose, complained that the old travelled road might be closed up. F. replied that they would still have the short road leading to the road allowance, which would be opened if the old travelled road were closed.

Held, that the latter statement, in connection with the facts of the former user of the road, of its not having been disposed of when F. disposed

of the lands on each side thereof, sufficiently showed the intention to dedicate the short road to the public: that the applicant had therefore another convenient way to his lands, and that the by-law should not be quashed; but, under the circumstances, without costs.

CHANCERY DIVISION.

[PROUDFOOT, J., 22ND MAY, 1883.]

JENKINS v. CENTRAL ONTARIO RAILWAY CO.

Railway Company—Mining rights—Expropriation of mines—Clerical error in statute.

The Act, 45 Vict. cap. 61 (O), changed the name of the defendant Company from the Prince Edward County Railway Company (incorporated by 36 Vict. cap. 73,) to its present name, and amongst other things, authorized them upon their own property, and principally out of the ores obtained along their line, to manufacture iron and steel for their own use and for sale; and it further authorized them to acquire by purchase or gift, mines or mining properties or partial interests in the same and to develop or operate them. On the map required to be filed by the Company they marked a site for a station upon the plaintiff's lands, made a tender of compensation to the plaintiffs and gave notice to them to arbitrate; and they obtained an *ex parte* order for immediate possession from the County Judge. On the lands in question there was a valuable deposit of magnetic iron ore, which the defendants' officers were aware of, and it had been purchased by the plaintiffs several years before for mining purposes. The plaintiffs sought an interim injunction to restrain the Company from taking possession, alleging that they were endeavoring to acquire a valuable mine at a nominal value for the purpose of selling to one of their shareholders, which allegation, however, the Court was of opinion was not proved.

Held, that the Company had the right to expropriate the lands in question, for the power to acquire mines by purchase included the power to acquire them by compulsory purchase, and that the word "purchase" must have the same effect as the same word has when used in the general Railway Act, R. S. O. cap. 165, sec. 9, s-s. 2.

By section 14 of the 45 Vict. cap. 6, the clauses of the Railway Act of Ontario were incorporated with the defendants' act of incorporation. By the 36 Vict. cap. 73, sec. 2 (the original act of incorporation), the clauses of the Railway Act of the Consolidated Statutes of Canada were incorporated with that Act.

Held, immaterial, for it was a manifest clerical error, the intention of the Legislature being plain.

Moss, Q.C., for the plaintiffs.

Bethune, Q.C., for the defendants.

IN CHAMBERS.

[HAGARTY, C.], 10TH APRIL, 1883.

McNEILL v. McGREGOR.

Appeal from order in Chambers—Time for appealing.

Held, that the time for appealing from an order in Chambers runs from the date of the issue thereof and not from the day on which the decision is pronounced.

R. Martin, Q.C., for the appeal.

W. Nicholas Miller, contra.

[THE CHANCELLOR, APRIL, 1883.]

HARPER v. MARX.

Close of pleadings—Notice of trial—Computation of time.

The defendant delivered his defence on the 21st April, which was a Saturday, and the day after it was due. On the same day the plaintiff delivered a replication which contained an averment of a fact which the defendant set up in his defence, and which amounted merely to an admission of the truth thereof. He gave notice of trial for the sittings which were fixed for the 1st May. John Winchester, Esquire, official referee, dismissed a motion to set aside the notice of trial.

E. Douglas Armour, for the defendant, now appealed from this order on the ground (i) that the replication was not a simple joinder of issue within the meaning of Rule 176, and therefore the pleadings were not closed, and the notice of trial was irregular under rule 255; (ii) that under Rule 255, "not less than ten days," *i.e.* ten clear days, must elapse between the day of the close of the pleadings and the first day of the sittings; *Rumohr v. Marx*, ante p. 31; but the notice of trial under Rule 259 is only required to be ten days reckoned exclusively of the first day and inclusively of the last. Sunday being the first day after the day of the close of the pleadings is not to be counted; *Cooper v. Dixon*, ante p. 198.

Hoyles, contra. Rules 255 and 259 are part of the same order, and should be read so as to harmonize with each other. It was evidently intended that the plaintiff should be at liberty to go down to the first sittings for which he could give notice of trial of the required length of ten days, and therefore the ten days of the two rules should be the same. The pleadings here were closed, for the plaintiff was bound to make the

necessary admission in his replication of a fact which he did not wish to place in issue.

The CHANCELLOR held that the pleadings were closed. He also intimated that he would not set aside the notice of trial even if irregular, but would leave the defendant to assert his right by not appearing at the trial and allowing the plaintiff to proceed at his risk. On a subsequent day his Lordship gave judgment, holding that it was not necessary that ten clear days should elapse between the day of the close of the pleadings and the first day of the sittings, and that the notice of trial was therefore regular.

[2ND MAY, 1883.]

TOWNEND v. HUNTER.

Affidavit—Cross-examination—Commission.

An action for sale of mortgaged lands. The plaintiff formerly resided in this Province, and while so residing, placed money in his solicitor's hands for investment, part of which was advanced upon this mortgage. At the time of taking the account the plaintiff was, and for several years previous had been resident in Jamaica. The account was proved before the Master at Guelph by the affidavit of the plaintiff's solicitor, but the defendant's solicitor being dissatisfied with this, the usual affidavit from the plaintiff was procured. The defendant then applied to the Master for a commission to Jamaica to cross-examine the plaintiff on the usual material. For the plaintiff it was alleged that all moneys had been advanced through his solicitors, and that he had no personal knowledge of the facts and therefore nothing could be gained by the cross-examination. The Master refused to certify for a commission.

Held, reversing his ruling, that he had no discretion to refuse the commission when applied for to cross-examine the deponent of an affidavit filed by the opposite party, the applicant being entitled to it as a matter of course; but leave was reserved to the plaintiff to withdraw his affidavit and prove the case otherwise if he should be so advised.

W. Seton Gordon, for the appeal.

H. Cassels, contra.

H. C.

[25TH MAY, 1883.]

GRIFFIN v. GRIFFIN.

Infant—Maintenance.

An infant was consigned by her father to her grandmother's care, who undertook her maintenance as a gift to the father. After her husband

died, she became unable to support the child, and notified the father to that effect. She now claimed an allowance for past and future maintenance out of the infant's estate. It was not deemed expedient to remove the child from her grandmother's custody.

Held, that there could be no claim for maintenance prior to the time at which the father was notified of the applicant's inability to continue the maintenance as a gift, but an allowance was made for maintenance after that period and for the future.

[PROUDFOOT, J., 18TH MAY, 1883.]

CRUMLEY v. KINGSTON.

Lunatic not so found—Insolvent next friend—Security for costs.

A person of unsound mind, not so found by inquisition, brought his action by a next friend, who was worthless. The Local Judge at Kingston refused an order for security for costs, which was asked for by the defendant, on the ground of the insolvency of the next friend.

Held, affirming the decision of the Local Judge, that the plaintiff stood in the same position as an infant, and that his next friend need not be a person of substance.

See *Sharp v. Sharp*, 2 Chy. Ch. 244.

Langton, for the appeal.

H. Cassels, contra.

H. C.

[21ST MAY, 1883.]

BRIGHAM v. BRONSON.

Discovery between co-defendants before defence.

The defendant, D., was in the same interest as the plaintiff, who had granted him an extension of the time for putting in his defence, which period at the time of the motion had not expired. B., another defendant who possessed the same knowledge of the facts of the case left the country immediately after putting in his defence. The applicant, another defendant, after putting in his defence, procured an order permitting him to examine the defendant D. for the purpose of discovery, the plaintiff having no knowledge of the facts, and also an order for production.

Held, affirming the decision of John Winchester, Esquire, official referee, that the applicant was entitled to both orders.

Arnoldi, for the appellant.

W. Fitzgerald, contra.

PARR v. LOUGH.

Entering action for trial—Three days before trial—Sunday—Rules 264, 455.

The sittings at London were fixed for Tuesday, 1st May. On Saturday, 28th April, the plaintiff's solicitor attended on the officer of the Deputy Registrar for the purpose of entering the action for trial pursuant to Rule 264, but the Deputy Registrar refused to enter it on the ground that the intervening Sunday was excluded from the computation by Rule 455, and therefore the plaintiff was a day late.

Held, that the Deputy Registrar's interpretation of the Rules was right, and the defendants not consenting to the case being entered, an order to place it upon the list was refused.

H. C.

[21ST MAY, 1883.]

LINDOP v. MARTIN.

Mechanics' lien—Promissory note—Running account.

A mechanic took a promissory note from the owner of the building while the work was going on, which matured before the time for registering a lien had expired. The note was dishonoured and the mechanic registered a lien.

Held, reversing the decision of the Master at St. Thomas, that he had not waived his right to register and enforce his lien.

A hardware merchant supplied goods from day to day for a period of some weeks to a contractor who was building several houses under separate contracts. Nothing was said as to the goods being supplied for any particular building, nor was there any express contract between the merchant and the contractor. The merchant registered a lien within thirty days from the date of supplying the last article.

Held, reversing the decision of the Master, that the furnishing of the goods from day to day must be considered as a continuing contract for the whole of which a lien might be enforced, though some of the goods were supplied more than thirty days before the registering of the lien.

A material man supplied goods to a contractor on credit and charged them in a running account. The contractor received sums of money at different times from the owner, who also kept a running account with the contractor, and paid them to the material man. No appropriation was

made either by the owner of his payments to the contractor, or by the contractor of his payments to the material man. The latter credited the payments generally in the account with the contractor, and filed a lien for the balance including the latest items of the account in his lien.

Held, reversing the decision of the Master that, no appropriation having been made by the contractor of the payments to the material man, they should be applied to the earlier items of the account, and therefore the material man had the right to register his lien for those items of a late enough date to come within the act.

F. W. Glenn, for the appellant.

Hoyles, contra.

[THE MASTER IN CHAMBERS, 23RD MAY, 1883.]

JOHNSTON v. MCINTOSH,

Examination of Witness before trial—Rules 224, 285.

J. L. was trustee for the E. estate for about twenty years before 1881, when the plaintiff was appointed trustee in his stead. The action involved the consideration of transactions which took place during J. L.'s trusteeship, and, on being examined, the plaintiff was found to know nothing of them. In another action the Master had found the E. estate indebted to J. L., and if the plaintiff in this action should recover the property in question for the estate, J. L. would be benefitted.

H. Cassels, for the defendants, moved for an order for the examination of J. L. before trial, under Rules 224 and 285.

Davidson Black, contra, contended that J. L. was one of the plaintiff's witnesses, and that the application was a fishing one to put the defendants in possession of his evidence before trial.

The MASTER IN CHAMBERS, made the order.

H. C.

COOTS v. COOTS.

Speedy trial—Production before defence—Rule 221.

The plaintiff had been awarded an interim injunction restraining the sale of certain chattels, and had been put upon terms to go down to the Toronto Sittings which took place shortly afterwards. The time for defence had not expired, and it was probable that in the ordinary course of events the action would have come on for trial before production could have been obtained in the usual manner.

Frazer Lefroy now moved on short notice, by leave of the official Referee, for an order that the defendants make production notwithstanding that their defence was not delivered.

A. Hoskin, Q.C., for the defendants, contended that until the defence was delivered it was impossible to say what issues would be raised, and therefore it could not be ascertained what the documents were which related to the matters in question.

JOHN WINCHESTER, official Referee, held that the order asked for might be made under Rule 221, and he made the order accordingly for production within four days, though the defence would not be due in ordinary course until after that time had expired.

H. C.

County Court, Waterloo.

MCLEAN v. BREITHAUPT.

Interpleader—Seizure by attaching creditor—Stoppage in transitu.

Held, that the right of stoppage *in transitu* of goods consigned to a debtor who absconds before taking possession is not superseded by an attachment and seizure thereof at the instance of an attaching creditor.

The facts of the case are as follows:—Prior to the 15th of August, 1882, goods were consigned by the plaintiff to one William Gillies, of Preston, on the usual terms of credit. The goods arrived a day or two afterwards at the station of the Great Western Railway, and Gillies was duly notified.

but did not pay the freight nor remove them. On 4th September, Gillies having absconded, a writ of attachment issued at the suit of the defendant against Gillies, and the Sheriff seized the goods, paid the freight, and removed the goods, which were subsequently sold, and the proceeds paid into Court. On September 7th, the plaintiff notified the Sheriff that the goods were his, and demanded them accordingly.

An issue was directed to be tried before the learned Judge of the County Court, without a jury; and on the case coming on for trial a verdict was entered for the plaintiff.

A. Millar obtained an order nisi to set aside this verdict for the plaintiff, on the ground (1) That the goods had reached their destination. (2) That there was no evidence of the insolvency of Gillies, but only of his having absconded. (3) That the goods having been removed from the possession of the carriers, and the freight paid, it could not be contended that the *transitus* had not ceased. (4) That the sheriff had the right to occupy Gillies' position and to accept the said goods, which he did.

A. C. Galt, for the plaintiff, showed cause, and argued that the law favoured the recaption of goods at all times and places until they have actually come to the possession of the vendee by himself or his agents; *Gibson v. Carruthers*, 8 M. & W. 336; *Lewis v. Mason*, 36 U. C. R. 590; *Wiley v. Smith*, 2 S. C. R. 1. The right of stoppage is not lost by an attachment; *Smith v. Goss*, 1 Camp. 282. The fact of a consignee absconding is quite sufficient evidence of insolvency; *Benjamin on Sales*, p. 696.

LACOURSE, Co. J. [After commenting upon the above cases]. In *Dow v. Law*, 12 C. P. at p. 463, Draper, C.J., in discussing the right of the Sheriff on an execution to seize goods while *in transitu*, says, "Whether the sheriff could even on an execution against the firm seize goods while *in transitu* is not so clear. I have found no decision in favour of the sheriff's authority, and there is much said in the course of the opinions of the Judges in *Oppenheim v. Russell*, 3 B. & P. 42, to lead to a contrary conclusion." I think it very questionable if Gillies ever intended to pay for these goods when he ordered them, and his subsequent conduct would justify the conclusion. The facts and circumstances in this case and those in *Davis v. McWhirter*, 40 U. C. R. 598, are very nearly identical.

Order discharged.

(Reported by A. C. Galt, Esquire, Barrister-at-Law.)

Division Court, York.

PHILLIPS v. AUSTIN; THE TREASURER OF YORK, GARNISHEE.

Garnishee process—Juror's pay.

The allowance to a juror is not attachable in the hands of the Treasurer at the suit of a judgment creditor of the juror.

MCDUGALL, JUN. J.—This is a garnishee proceeding upon a judgment obtained by the plaintiff against the defendant, in September, 1881. The defendant, it appears, served as a juror in one of the Courts at the Spring Assizes, and there was due to him for his services as such juror from the Treasurer of the County of York, the sum of \$31.50, as juror's fees. This sum the plaintiff seeks to attach. It is contended on behalf of the defendant that this money is not liable to garnishing process. It was argued that it would be contrary to public policy to allow such moneys, which are payable as maintenance to the juror, to be available to the juror's creditors. No cases directly in point were cited by counsel for plaintiff or defendant, but the argument was pressed on the above grounds. I have taken some trouble in looking for authority, as I consider the point involved of considerable importance, and certainly of great interest. The frequent occasions when money or other property is in the hands of officers of the law and of persons acting under legal authority, will naturally give rise to efforts to reach it by attachment at the instance of creditors of the persons entitled. In the United States, however, I find that the point was early considered, and expressly decided, that a public officer who has money in his hands to satisfy a demand which one has upon him merely as a public officer, cannot for this cause be adjudged a garnishee: *Chealy v. Brewer*, 7 Mass. 259; *Bulkley v. Eckert*, 3 Penn. St. 368; *Clark v. Clark*, 62 Maine 255; *Drake on Attachment*, 493.

The language of our Division Courts Act, sec. 124, is, that *any debt due or owing* to the debtor from another, may be attached. Can a juror's fees, payable by the County Treasurer, be called a debt? These fees are payable by the County through their Treasurer, whose authority to pay is the pay list checked and certified by the sheriff; R. S. O. cap. 48, secs. 137, 139 and 140; and part of the sum payable is for mileage of the juror. The juror serves the Province and his county in obedience to the laws of the Province. There was no contract, express or implied, between him and the county, and I think therefore that the sum payable by virtue of these laws, is not a *debt* within the meaning of the Division Courts Act. In our own Courts it has been held that the salary of a municipal officer who holds his office at the will of the corporation, at a yearly salary payable quar-

terly, is not garnishable until some part of it is overdue : *Shanly v. Moore*, 9 U. C. L. J. 264.

Again, on the ground of public convenience it would, it seems to me, be mischievous to hold jurors' fees attachable, because it would suspend during the pendency of an action a possibility of settling the accounts of the officer summoned as garnishee ; and it might compel him to attend at great inconvenience courts in any part of the county, to answer the action ; for although the plaintiff may issue his summons in the division where the garnishee resides, he is not bound to do so ; and instead of the receipt of the person who is entitled to the money the officer would have to produce and verify the process under which it was paid.

On the ground of public policy, too, I think the plaintiff must fail. The money is not payable to the juror as compensation or reward, but solely as maintenance or expense money, and where a man without ready means, who chanced to be unfortunate enough to have a number of Division Court judgments hanging over him, is summoned as a juror, he might be refused accommodation on the ground that his pay as juror was liable to be attached by his creditors ; and he himself would be exposed to the risk of fine or punishment for disobeying his summons as a juror, when the fault would not be his, but that of the law which, although it allowed him his expenses, at the same time permitted the money to be attached by creditors having antecedent claims.

For these reasons, I think, the summons against the garnishee must be dismissed.

NEW BRUNSWICK.

In the Supreme Court.

[NOVEMBER, 1882.]

PHAIR v. VENNING.

Fisheries Act—Regulation—Riparian owner—Right of fishing—Fishery Officer—Notice of action.

By section 19 of "*The Fisheries Act*" (31 Vict. cap. 60), the Governor-General in Council is empowered to make regulations for the better management and regulation of the sea-coast and inland fisheries ; to prevent or remedy the destruction or pollution of streams ; to regulate and prevent fishing ; to prohibit the destruction of fish ; and to forbid fishing, except

under authority of leases or licenses; such regulations to have the same force as if they were contained in the Act, notwithstanding that they may extend, vary or alter any of the provisions of the Act respecting the places or modes of fishing, or the terms specified as prohibited or close seasons; and may fix such other modes, times or places as may be deemed by the Governor in Council to be adapted to different localities, or may be thought otherwise expedient. The following regulation was made as under the authority of the above section: "Fishing for salmon in the Dominion of Canada, excepting under the authority of leases or licenses from the Department of Marine and Fisheries, is hereby prohibited."

Held, that this regulation (so far as might be held to extend to riparian proprietors on non-tidal rivers) was not authorized by sec. 19 of "*The Fisheries Act*."

Held, also, by Allen, C.J., Weldon and King, J.J., that a person in possession of land bordering on a non-tidal river, as a tenant at will of the owner, is entitled to be treated as a riparian owner, so far as regards the right of fishing.

Held, also, by Allen, C.J., Weldon and King, J.J., that a fishery officer who wrongfully prevented a riparian owner from exercising his right of fishing, was not protected by C. S. N. B. cap. 89, nor entitled to notice of action under cap. 90.

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FEDERAL LICENSE COMMISSIONERS AS AFFECTED BY THE MUNICIPAL ACT, ONTARIO.

IT might have been expected that the passage through the Parliament of Canada of the McCarthy Act, for the regulation of the traffic in intoxicating liquors, would provoke a good deal of discussion. The subject has always been claimed by the Province of Ontario, at least, as a matter within Provincial jurisdiction. The McCarthy Act was passed in consequence of the decision in *Russell v. Reginam*, L. R. 7 App. Ca. 829, which very plainly defines the power of the Federal Parliament in such affairs, while confirming the validity of the Scott Act, a cognate measure. While the constitutionality of the McCarthy Act is denied, notwithstanding *Russell v. Reginam*, it is also assailed on other grounds, one of which only we propose to discuss just now.

The act declares in effect, (we have not a copy at hand and cannot speak as to the exact words) that the Warden of each County, who is the head and chief officer of the County Council, shall be *ex officio* a License Commissioner under the Act. Now the Legislature of Ontario, in the exercise of its undoubted jurisdiction over Municipal Institutions, has enacted that no License Commissioner (amongst certain other persons) shall be qualified to be a member of the council of any Municipal Corporation.

Upon this disqualification clause is based an argument directed against the ineffectiveness of the McCarthy Act. It is however entirely an *argumentum ad populum*.

The argument is this. On account of the Municipal Act, a man cannot be both Warden and License Commissioner, because the latter office disqualifies him for the former. If, therefore, you make the Warden a License Commissioner, you disqualify him for the office of Warden.

It is easily seen how the proposition refutes itself; for every Warden upon his election becomes *ex officio* a License Commissioner and is disqualified (the office of License Commissioner being attached to the office, and not the person, of the Warden) and the consequence would be that no County Council could ever have a head. This would be giving the Federal Parliament an oblique jurisdiction over County Councils which it admittedly does not possess. This absurd conclusion shows plainly that both Acts cannot have full effect in this respect, and either one of them must therefore succumb to the other.

In discussing this point it must be remembered in the first place that the term License Commissioner, as used in the Municipal Act, had no reference whatever to the office created by the McCarthy Act, which was not in existence when the Municipal Act was passed, but referred solely to the License Commissioner of the Crooks Act. It is only on account of the identity in name that the question arises. This is so self-evident from the dates and circumstances attending the legislation, that it seems almost sufficient to say, that the Municipal Act manifestly never did, and therefore does not now, apply to the License Commissioner of the McCarthy Act.

In order to lay the foundation for the argument against the latter Act it must be successfully shown that the Municipal Act should be read as if it had been passed after it, and therefore must have reference to the office of License Commissioners created by it. Assume that to be so. Then there is broached a more grave question. The point at issue would then be, has the Federal Parliament power to select a person filling an office created by the Provincial Legisla-

ture, to perform Federal duties? That being answered in the affirmative, can the local Legislature then declare that its officer shall not perform those Federal duties?

It seems clear that the Parliament can say, whenever a County shall select a man to be Warden of the county, that man shall be our License Commissioner. The Parliament, thus legislating, does not assume to interfere with municipal institutions by directly legislating upon the office of warden. True it is that the duties of Warden are thereby increased. But so were those of the judges of the Courts for the trial of Dominion controverted election cases, which is almost a parallel case. There the Judges of the Provincial Courts were made *ex officio* Judges of the Federal Courts; and their appointment by the Act was said to be a statutory commission, and the effect was not to interfere with the Provincial Courts, a subject clearly beyond the jurisdiction of the Parliament.

For instance, the Chief Justice of Canada says, "Whether therefore the Act of 1874 established a Dominion Election Court or not, I think the Parliament of the Dominion, in legislating on this matter, on which they alone in the Dominion could legislate, had a perfect right, if in its wisdom it deemed it expedient so to do, to confer on the Provincial Courts power and authority to deal with the subject matter as Parliament should enact" (a). And again, "I have had no great difficulty in arriving at the conclusion that this Act substantially establishes * * a Dominion Court, though it utilizes for that purpose the Provincial Courts and their judges" (b). Many other such passages occur in the judgments in this case, all tending in the same direction. By a substitution of terms we might enunciate similar propositions respecting the matter under discussion. For instance, why should not the Federal Parliament "confer [on the Wardens] power and authority to deal with the subject matter [the issuing of licenses], as Parliament should enact;" or, to use another expression

(a) *Valin v. Langlois*, 3 S. C. R. at p. 18.

(b) *Ibid.* at p. 27.

from the learned Chief Justice's judgment, why should not the Parliament "utilize for its purposes" the Wardens of the counties?

So in dealing with the same question, Sir A. A. Dorion, C. J., puts the matter thus:—"The judges of the Superior Court as citizens are bound to perform all the duties which are imposed upon them by either the Dominion or the Local Legislature" (c). The matter then resolves itself into one of convenience, to be dealt with as pointed out by the learned Chief Justice in the concluding words of his judgment. "If these duties were either incompatible or too onerous to be properly performed, provided neither Legislature had exceeded the limits of its legislative power, it would become the duty of the Local and Dominion Governments to suggest a remedy by some practical solution of the difficulty, but it does not devolve upon Courts of Justice to assume the authority of declaring unconstitutional a law, on account of the real or supposed inconveniences which may result in carrying out its provisions."

Why (to adopt this opinion) should not the Federal Parliament have the right to impose upon the Wardens, as Canadian subjects of Her Majesty under its legislative control, duties required to be performed in order to the due administration of Federal laws?

Unless these cases can be successfully distinguished from the matter in hand, the power must be accorded to the Parliament to make the Wardens perform the duties of License Commissioners.

That being so, can the Provincial Legislature say that no man who is a License Commissioner shall be a Warden, or (which amounts to the same thing) no Warden shall be a License Commissioner? To give an affirmative answer to this, would be to attribute to the Provincial Legislature the power to prevent any man in the Province from performing Federal duties, for the power, if it exists, is not confined to any particular person. It exists, if at all, because of the sovereign power of the Legislature over all persons in the

(c) *Bruneau v. Massue*, 23 L. C. J. 60.

Province, of whom they may select one, or more than one, or include the whole population of the Province, and say that he or they shall not perform Federal duties—which is absurd. Granted the power to the Federal Parliament to create the office of License Commissioner and then to fill it, there must also be granted the power to select its own officers for the performance of the duties required by the Act to be performed, such officers being placed beyond the reach of any other legislative power in Canada with respect to those duties. Otherwise, the Federal Parliament would be paralyzed in the exercise of its legitimate functions by the action of a body having no jurisdiction in the premises.

It must be borne in mind that the primary legislative jurisdiction in Canada is vested in the Parliament of Canada. The powers of the Provincial Legislatures are secondary only, and exist by way of exception from the plenary grant of legislative functions to the Federal Parliaments, and they cannot therefore be paramount to it, though the Provincial bodies may legislate on certain subjects to its exclusion. That exclusive power, however, does not authorize them to withdraw from the operation of Federal laws, any person or persons whom they may designate as necessary to carry out exclusively Provincial legislation. Every Canadian subject owes as much obedience to Federal as he does to Provincial laws, and neither Legislature can absolve him from, or interfere with him in, his duty to the other.

As the matter is fresh, and has not been as yet debated, we are without the aid of much authority on the question, but general principles seem to favour the validity and effectiveness of the Federal law.

FRAUDULENT PREFERENCES.

The doctrine of fraudulent preferences is modern. It could formerly be said that "there is no rule of law which prevents a man from preferring one *bona fide* creditor to another" (a). And consequently before the bankruptcy laws there was no positive law in which was involved the principle of ratable distribution of a debtor's assets amongst his creditors. The policy of compulsory ratable distribution however, having once been introduced into our law, has proved its tenacity by the clinging of shreds of it to minds affected by the prevalence of equity, after the greater part has been torn away by the repeal of the Insolvent Act of 1875.

During the life of the Insolvency laws the insolvent debtor had an acknowledged status, and if he did not voluntarily make an even distribution of his estate (saving always a reference to the assignee's share), the law, being put in motion, seized upon his effects and made the ratable distribution for him (saving again the assignee's share). But before this period and since it, the law was and is devoid of such a principle, and ratable distribution is now founded entirely upon contract—contract as affected by the provisions of two Statutes, the 13 Eliz. cap. 5, and R. S. O. cap. 118, and we propose to collect the later authorities upon the all important subject of preferences.

Except as regards land we may practically discard the Statute of Elizabeth in dealing with conveyances by insolvent debtors, for, with the exception of the provision of the Ontario Statute against preferring one creditor to another, that enactment and the Imperial Act are substantially alike (b).

(a) Per Gibbs, C.J., in *Burton v. Thornhill*, 2 Mars. 430.

(b) *Gottwalls v. Mulholland*, 15 C. P. 62.

The Ontario Statute has no reference to lands (c) and they are therefore regulated in their disposition by the Statute of Elizabeth. The rule of the common law as to preferences was not altered by that Act, which had no such object in view as the equal distribution of assets, and therefore a man may still prefer one *bona fide* creditor to another by a conveyance of lands to him, if his intent be to secure that creditor and not to defeat others. An example of this may be found in *Somerville v. Rae* (d), where a creditor obtained a conveyance of land from his debtor in order to secure his debt, and the debtor intended to give such conveyance and knowingly gave it. Blake, V. C., said, "As the transaction cannot be attacked under the insolvent laws, although a preference, yet being for a *bona fide* debt which was actually to be secured, it stands." No doubt such a preference may have the effect of delaying and hindering others, but a clear distinction is drawn between the effect of the transaction and the intent of the debtor. "It may be," said Adam Wilson, J., "that the effect of a transfer of property must be to defeat and delay creditors, but if that be not the *object and intent* of it, it would not seem to be void" (e); and the object and intent are a question for the jury (f).

But the R. S. O. cap. 118, sec. 2 plainly prohibits the gift, conveyance, assignment or transfer of any of the debtor's goods, chattels or effects with intent to give one or more of his creditors a preference over the others; and such a conveyance shall be null and void as against the creditors of such person.

The conveyance is not absolutely void; but is voidable at the suit of creditors, though good as between the parties to it. Such vitality does it possess, that a perfectly valid title to the goods may be made by its means capable of transmission to a third person.

(c) *McNab v. Peer*, 3 C. L. T. 59.

(d) 28 Gr. 618; 1 C. L. T. 185.

(e) *Gottwalls v. Mulholland*, 15 C. P. at p. 69, citing *Henderson v. Lloyd*, 3 F. & F. 7.

(f) *Ibid.* at p. 71.

It is essential that execution should be obtained by the complaining creditor while the property assigned is in the hands of the preferred assignee. For the statute does not permit the creditor to follow the goods, nor to make the preferred assignee his debtor, and account to him for the proceeds of the sale (g). So in *Davis v. Wickson* (h), Boyd, C., says, "It is sought to make Wickson account for the proceeds of the securities impeached as fraudulent; it being admitted that the corpus of the property has passed beyond his control, and it being proved that before litigation he had paid over the money to his principals, who are not before the Court. The redress sought is specifically wrong. The right of the plaintiff in this class of cases is to have any impediments removed or declared invalid, which intercept the action of his writ of execution. So long as the property of his execution debtor remains distinguishable, and so long as no purchaser for value without notice intervenes, so long may the Court award relief against that property in the hands of fraudulent or voluntary holders." And his Lordship proceeds to point out that the only remedy left in such a case is that prescribed by the Statute of Elizabeth, whereby an action of debt may be had for a year's value of the land assigned, and the whole value of the goods, half to go to the Crown and half to the party aggrieved—not a very profitable venture for a creditor to enter into against an insolvent debtor and his accomplices, nor at all improved by the sharing of the Crown in the results.

Anything that is seizable under execution is within the Statute, and so promissory notes, which are exigible under R. S. O. cap. 66, sec. 28, cannot be transferred to one creditor in preference to another (i).

The mode of attacking a conveyance fraudulent under the Ontario Statute is peculiar. This is foreshadowed by the cases of *Stuart v. Tremaine* and *Davis v. Wickson*, which point to the remedy of the creditors. A subsequent assignee for the benefit of creditors cannot attack the conveyance.

(g) *Stuart v. Tremaine*, 2 C. L. T. 549.

(h) 1 Ont. R. 369; 2 C. L. T. 351.

(i) *Beattie v. Barton*, 2 C. L. T. 104.

Says Boyd, C., "The assignee, Clarkson, took only the equity of redemption under the voluntary assignment to him, the mortgage being good as between the party to it and volunteers under them. He therefore could not attack the mortgage as representing creditors, although an assignee in insolvency (*i. e.*, under the Insolvent Act, 1875) might do so (*j*). The impeached transaction must be attacked by a creditor who seeks to remove the obstruction to his execution. If the obstruction be removed the goods become subject to his execution if it is the first charge, or subject to a general assignment for the benefit of creditors, if such an instrument has been made before the creditor's execution issues. And such is now the recognized mode of attacking a fraudulent preference (*k*).

It is possible, however, for a preference to be good notwithstanding the provisions of the statute, for the doctrine of fraudulent preferences is not complete without its complementary doctrine of pressure. *Brayley v. Ellis* (*l*), was the first case in which the doctrine appeared after its revival consequent upon the repeal of the Insolvent Act of 1875, Ferguson, J., saying, "I think the so-called doctrine of pressure now occupies the same position as it did before the passing of the section on which the case, or the branch of the case, *Davidson v. Ross*, alluded to, was decided."

The pressure must be *bona fide*. A threat of action is sufficient (*m*); so is solicitation (*n*); so is a trick by which the creditor gets possession of the securities (*o*); so is the holding in suspense of a rule to strike an attorney off Rolls (*p*).

(*j*) *Parkes v. St. George*, 2 Ont. R. at p. 347. See also *Lumsden v. Scott*, 3 C. L. T. 170.

(*k*) *Meriden Silver Co. v. Lee*, 2 Ont. R. at p. 456; *Parkes v. St. George*, *supra*.

(*l*) 1 Ont. R. 119; 2 C. L. T. 147.

(*m*) *Segsworth v. Meriden*, 3 C. L. T. 34.

(*n*) *Totten v. Bowen*, 3 C. L. T. 159; but this solicitation was the solicitation of an injured wife and must be classed with the importunity of the widow and the midnight friend of the gospel; Luke xi. 8; xviii. 5.

(*o*) *Whitney v. Toby*, 2 C. L. T. 502.

(*p*) *Grant v. VanNorman*, 2 C. L. T. 504.

We cannot leave this subject without a reference to a case in which ratable distribution was made the price of a summary proceeding against the debtor.

The case is *Kinloch v. Morton* (q). In that case the plaintiff, before the defendant appeared, moved for judgment under Rule 324, which declares that when "it is made to appear to the Court or a Judge * * that it will be conducive to the ends of justice to permit a notice of motion for judgment to be forthwith served, the Court or a Judge may order the same accordingly. * * Upon the hearing of such motion the Court may grant or refuse the application, or, instead of either granting or refusing the same, may give such directions for the examination of either parties or witnesses, or for the making of further inquiries, or with respect to the further prosecution of the suit, as the circumstances of the case may require, and upon such terms as to costs as the Court thinks right." Osler, J., in granting the application, made the order for judgment conditional upon the plaintiff's sharing ratably with other execution creditors who might place their writs in the sheriff's hands after the plaintiff, and within the time at which the plaintiff would have been entitled to issue execution in the ordinary way on a judgment by default, in case there should not be enough property to satisfy the plaintiff's writ. The plaintiff was also required to file an affidavit denying collusion with the debtor.

Now, collusion with the debtor is perfectly valid, and a creditor gaining an advantage by such collusion will be maintained in his position if he has not sinned against the provisions of R. S. O. cap. 118, sec. 1—and that question did not arise in this case. So, if, on the one hand, a debtor may prefer a creditor by defending one action and aiding the plaintiff in another, the latter plaintiff may on the other hand lawfully gain the preference, if he can do so by his own exertions and vigilance. Should he be impeded or hampered in his exertions? Mr. Justice Osler says, "I think it is conducive to the ends of

(q) 9 P. R. 38; 1 C. L. T. 660.

justice to permit the plaintiff to sign judgment and issue execution forthwith. Such a case has, I think, been made out here, and therefore I grant the motion. But I should, as far as possible, guard against doing injustice to other creditors whose suits may be proceeding in the ordinary way, for the rule should not be applied for the purpose of enabling one creditor to obtain an undue advantage; one of its primary objects being, as I take it, to preserve property and prevent it from being removed from the reach of an execution." It will be observed that the condition of ratable sharing applies only in the event of a deficiency of assets, and thus Rule 324 becomes to some extent the means of administering an insolvent estate. The vigilant plaintiff not only has to suffer the loss occasioned by the want of sufficient property to satisfy his execution, but immediately it is ascertained that he is to suffer a loss he is ordered to increase his loss by putting his hand into his pocket and distributing a proportion of the fund amongst others who were not so active. Nowhere else is the advantage of being first execution creditor called "undue," and if not, why should the plaintiff be hampered by conditions? Neither is it "injustice" in the eye of the law to allow a creditor by means of active litigation to obtain and maintain a preference. Ratable distribution of an insolvent's assets is at the present day based upon contract and not upon a positive ordinance. In the absence of a contract between the debtor and his assignee in trust, we know of no law in Ontario which requires a debtor to distribute his assets ratably amongst his creditors, nor any law which requires one creditor to abandon an advantage in favour of others, nor of any law which can take a debtor's estate and distribute it, except by means of writs of execution. Now, writs of execution cannot all come into the sheriff's hands at the same time. There must be some order of priority. Can that order of priority be disturbed, and the creditors directed to share ratably by the exercise of a discretion, as the indirect result of the Rule, which the legislature passing the rule could not directly authorize the Judge to exercise? Again, how long is the ratable distribution to

continue? Until the plaintiff's execution is satisfied? If the first levy be not sufficient there is a ratable distribution. If a second levy should subsequently be made, and still not sufficient made to satisfy the plaintiff, is there to be another ratable distribution? Lastly, are the execution creditors who were not parties to this motion and order bound by it? Cannot the second execution creditor object to any portion of the levy going to the third? Has he not a right to demand that everything that is made shall be applied upon the first execution until it is satisfied? In other words, how can the priority of other execution creditors be dealt with or affected in their absence? And is the accident of a creditor's ill-advised motion for speedy judgment a sound basis for a ratable distribution of an insolvent estate?

At any rate, this case now stands as the leading case on the subject, and a motion under Rule 324, where there are other creditors suing and the estate is insufficient to pay the party moving, must be considered as an attempt to gain an undue advantage or an unjust preference.

EDITORIAL REVIEW.

Stamps on Promissory Notes.

We refer to this subject again in order to call attention to two decisions pronounced upon the Act since our last issue, diametrically opposed to each other—the one in Quebec, the other in Ontario.

In *Filion v. Roy*, 6 L. N. 175, Chagnon, J., expresses it as his opinion that the double stamps cannot be affixed since the repeal of the Stamp Act. In *Bank of Ottawa v. McMorro* (*postea*) the Chancellor of Ontario holds that double stamps may be affixed.

In the former case, the learned judge rests the question upon the meaning of the proviso that “all rights acquired under the said Act, or any Act repealed by it, shall remain valid.” He holds that the right of a defendant to say that the unstamped note is void was a right acquired by him at the time of the repealing Act, and therefore remains; but that the right of the holder to double stamp the note was not an acquired right unless he had exercised it before the repeal. The note, unstamped, was absolutely void, and remained so till the Act was passed, when the right to plead the defence of defective stamping was preserved to the maker. We do not agree with this line of argument. The note, unstamped, is not absolutely void. It is tainted with vice, it is true, but it is not a nullity. It becomes absolutely void only when in the hands of a holder, who, on becoming aware of the defect, acquiesces in it. Indeed such a holder might still transfer such an instrument to a *bona fide* purchaser, who might validate the note by double stamping it on discovery of the defect. Nor can we agree that the right of the maker of a note to plead defective stamping is an acquired right within the meaning of the Act. No man acquires a right as the immediate result of

his own wrong, and no good law seeks to perpetuate, to the detriment of another, without adding some period of limitation, an advantage gained by one's own wrongful act or omission. It was the primary duty of the maker to affix and cancel the stamps. Failing in this, he did not acquire a right, but he was guilty of a wrong. The endorsee of such a note, on discovery of the defect, might perfect the instrument. This was a right acquired in every sense of the word, but lost again immediately if not exercised. The learned judge also states that if the Legislature had intended to preserve the right of double stamping it would have been expressly saved. Whether it did or not depends partly upon the question whether that right was an acquired right, and partly upon the consideration involved in it that the Legislature, if it did not intend to preserve the right, intended to confiscate a large amount of property without any warning.

It must be observed that in the saving clause the Parliament has preserved the right of enforcing and recovering all penalties incurred under the repealed Acts. The maker of a note, by omitting to stamp it, incurred a penalty of \$100, and his liability for the penalty is expressly saved. It is hardly likely that this is the person whose interests are so tenderly protected by the Legislature that his acquired right to take advantage of an offence against the State is preserved to him. We prefer to look at the holder's right of double stamping as the acquired right; and to believe that the Parliament intended to save to the Crown the right to collect the double revenue to which it might become entitled, as against those who had previously committed, wittingly or unwittingly, the offences against the revenue.

The learned Chancellor of Ontario bases his decision to some extent upon the provisions of the Interpretation Act. Section 7, sub-sec. 36 of the Act declares that "the repeal of any Act, at any time shall not affect * * any right * * existing * * before the time when such repeal shall take effect." Perhaps it savours too much of refinement to argue that the particular proviso in the repealing

Act controls the general proviso in the Interpretation Act, and that there is a difference between a right existing and a right acquired. But whichever clause is resorted to for aid, we think the result should be the same.

As we now have decisions both for and against the construction which we contend for, it is not unlikely that a full court will be asked to pronounce upon the effect of the Act.

Professional Attire.

The *Central Law Journal* copies our remarks upon this subject for the expressed purpose of showing how the pulse beats under the gown; but the learned editor calls to his aid some phrases of such questionable taste in his comment upon the passage, that we fear his morsel of criticism will not enhance his reputation for either refinement or elegant writing.

Our remarks were directed against carelessness in dress and in conforming to existing regulations—not against any restiveness under those existing rules which require a barrister to don his robes before appearing in court. We can hardly pay the learned critic the poor compliment of saying that he does not see the drift of our remarks. His concluding observations are as follows: “We congratulate our Canadian fellow-craftsman upon this evidence, slight as it is, of a progressive tendency. It is an indication that they are following in the footsteps, albeit *haud æquis passibus*, of their more fortunate neighbors.”

If the wearing of a soiled neckcloth and disordered raiment is an indication of progress, we have no desire to hasten our steps in that direction. Nor do we believe that the advance of intellect is indicated by breaches of good manners. There are many ways of offering an affront to the Court; and whatever the act or omission, however trivial in itself, if it be an affront, it should be condemned.

The *Central Law Journal* should be particularly careful when inclined to be supercilious touching the Profession in Canada. It is a thing to be remembered that it owes its early growth and immense circulation and popularity to a

Canadian—a man born in Toronto and trained within the precincts of Osgoode Hall, who to-day stands intellectually head and shoulders over any man of his age or rank at the bar in the United States, and on an equal footing with many older men.

With regard to the custom of wearing gowns there is, as far as we are aware, no tendency in Canada to become restive under it, and therefore there is no need of opening up or continuing a discussion upon it. We think our contemporary is a little at fault in his history when he calls the wearing of gowns "the relic of an antiquated and semi-barbarous ceremonial." Be that as it may, there is very little of the barbarous either about our Courts or about the fine portraits of the Chief Justices and Chancellors of Upper Canada and Ontario which adorn the walls of Osgoode Hall, in all of which the graceful robes appear.

When we take into consideration the advisability of adopting some marks of progress in professional attire and decorum, we shall study this picture:—

"Thus spake Judge Lynch, as there he sat in Alabama's forum;
Around he gazed, with legs upraised, upon the bench high o'er him;
And, as he gave this sentence stern to him who stood beneath,
Still, with his gleaming bowie-knife, he slowly picked his teeth.

"It was high noon, the month was June, and sultry was the air,
A cool gin-sling stood by his hand, his coat hung o'er his chair;
All naked were his manly arms, and, shaded by his hat,
Like an old senator of Rome, that simple Archon sat.

* * * * *

"They hailed him with triumphant cheers—in him each loafer saw
The bearing bold, that could uphold the majesty of law;
And raising him aloft, they bore him homeward at his ease—
That noble judge, whose daring hand enforced his own decrees."

The Laws of Canada.

In discussing the subject of Provincial Jurisdiction over Civil Procedure last year, we made some remarks upon the extent of federal powers to erect courts (2 C. L. T. 513), pointing out that the solution of the question depended upon the construction of the phrase "the Laws of Canada" (*Ibid.* 579). Without hazarding an opinion upon a question almost devoid of authority, we expressed the inclination of

our opinion to be towards a construction which would include in the phrase all laws in force in the Dominion, whether of Federal or Provincial (and we might now add Imperial) origin. Our remarks are now justified by the result of a motion made to the Judicial Committee of the Privy Council in *McLaren v. Caldwell*.

We print in the Occasional Notes of this number that part of Mr. Bethune's argument and their Lordships' comments upon it, and an extract from the judgment granting leave to appeal, which bear upon this question. We are enabled to publish this through the kindness of the solicitors in the cause from whose copy of the short-hand reporter's notes is taken what we publish. It will be seen that the point was put fairly to their Lordships and fairly answered, and from the remarks and the effect of the judgment we think it cannot now be disputed that the term Laws of Canada includes Provincial as well as Federal laws.

The Administration of Justice in Manitoba.

The complaint is now made public of alleged irregularities in the Master's office in Winnipeg, and a Commission of Enquiry is, we believe, now engaged in examining into the state of affairs in that office. That the affairs are in a state of confusion is beyond dispute, the Master admitting it; but his defence is that he has been performing the duties of Master and Accountant single-handed, with the exception of occasional aid from an accountant employed from time to time by the Government. Whether the Master is personally to blame, or has been trying to perform duties beyond his capacity, we do not see how the authorities are to escape responsibility. A public office should not by any chance get into such an advanced state of confusion, without escaping notice. The machinery of justice should be kept scrupulously pure, especially where the accounts with suitors are required to be kept and funds are managed. Let the public for a moment lose confidence in the security which we are proud to say a Court of Justice always commands in this country, and years will not mend the mischief. It is to be hoped that the Commission will

act promptly and vigorously, that its proceedings will be made public when completed, that the blame will be laid in the right quarter, and that the remedy will be prompt, and if necessary severe.

The Titus-Marsh Affair.

The friends of our able contributor Mr. Marsh—in fact all right-thinking men—will be glad to learn that the Grand Jury found no bill against him.

The correspondence and controversy are now well known to almost every one. Mr. Marsh, in the course of his duty as a solicitor, threatened to move to strike Mr. Titus off the Roll of Solicitors if he did not make a settlement of a certain affair, one part of the proposed settlement being that Mr. Titus should procure a release of action from a client of his. Upon this a warrant was issued for Mr. Marsh's arrest on the charge of sending a letter demanding a valuable security with menaces! Five magistrates having heard the evidence, three of them were for committal and two against, and Mr. Marsh was accordingly committed for trial, with the result mentioned. The originators and proprietors of this enterprise have shown themselves to be possessed of such huge intellectual calibre and nice discrimination, that we should not be surprised now to hear of their prosecuting a bare trustee for indecent exposure.

The matter now assumes an entirely different aspect; and it is not unlikely that Mr. Titus will make his bow to the Committee on Discipline at Osgoode Hall.

The Bench in Manitoba.

We notice the appointment of W. D. Ardagh, Esquire, to a seat on the Bench of one of the County Courts in Manitoba. The writer, who has no recollections of a personal acquaintance with Mr. Ardagh that are not of the most pleasant description, has the more pleasure on that account, in congratulating him upon his accession to judicial honours. But Mr. Ardagh has the right, so to speak, to the congratulations of the professional press of Canada, for he, in conjunction with several others, was for some

years Editor of the *Upper Canada Law Journal*, now the *Canada Law Journal*.

The New Examiners at Osgoods Hall.

The Benchers of the Law Society of Upper Canada have elected Mr. W. A. Reeve and Mr. Marsh to succeed Mr. McDougall and Mr. Hodgins as Examiners in Criminal Law and Torts, and Equity Jurisprudence respectively. Mr. Delamere and Mr. Armour were re-elected examiners in Mercantile Law and Real Property Law respectively.

The Law School is continued for another year, the examiners being *ex officio* lecturers, and Mr. Delamere becoming Chairman by seniority of appointment.

The Thrasher Case.

This now celebrated case has been pronounced upon by the Supreme Court of Canada. That Court holds unanimously that the Judicature Act of British Columbia is within the competence of the Provincial Legislature, thus reversing the Supreme Court of British Columbia.

The particulars of the judgment have not yet come to hand, and we are therefore unable to say how far our remarks made upon the subject last year are confirmed.

BOOK REVIEW.

A Concordance of Words and Phrases construed in the judicial reports, and of legal definitions contained therein. By JOHN D. LAWSON, author of "Usages and Customs," "Leading Cases Simplified," "Contracts of Carriers," etc., St. Louis : F. H. Thomas & Company, 1883.

We do not know of a more useful reference book than this. The words and phrases are arranged in alphabetical order. Whether a particular word or phrase construed is contained in a pleading, statute, will, policy or deed, is shortly indicated by appropriate words. Then follow the cases in which the word or phrase is to be found. Even this classification, slight as it may at first sight seem, must have largely increased the stupendous task that Mr. Lawson has carried to a successful conclusion. A table of cross references is appended by means of which a particular word may be traced through other phrases than that in which it is found in the first part : For instance, "Decease, from and after the—In will," then follows a case where the phrase has been construed. Turning to the table of cross references we find under "Decease," the following phrases :—"Money due at my decease"—"Living at the time of my decease"—"In case of the decease"—"If any remains at her decease." In each one of these phrases occurs a word in black type. Looking for that word in the concordance proper we find all the cases in which the phrases occur.

The work was well thought of and is the result of untiring industry.

BOOK RECEIVED.

Principles of Conveyancing. An elementary work for the use of students. By HENRY C. DEANE, of Lincoln's Inn, Barrister-at-Law. Second edition. London : Stevens & Haynes. 1883.

REVIEW OF EXCHANGES.

Central Law Journal—26th January, 1883.

Excuses for Notice to a Drawer of a Bill of Exchange, by CHAS. A. BUCKMAN. "Notice of dishonour is dispensed with in cases where the drawer of a bill of exchange has no funds or effects in the hands of the drawee, and has no reasonable expectation of having any when the bill matures, or when he withdraws, or intercepts the transmission of funds to be appropriated for the payment of the bill." This is on the ground of fraud. *Secus* when the bill is drawn against a consignment, or there is a fluctuating balance between drawer and drawee, or a running account between them. A promise by the drawer to the holder to pay either before or after maturity amounts to a waiver of notice.

Filthy Percolations, by DANIEL MCGOWAN. A few cases are noted on the obligation of a proprietor to prevent injury to his neighbour's land by the escape of water.

Ibid.—2nd February, 1883.

Stoppage in Transit, by ADELBERT HAMILTON. A number of cases on the subject are noted.

Receivers of Mortgaged Property, by ISAAC H. LIONBERGER. Lord Eldon's dictum is quoted that, "The rule about receivers is clear; a mortgagee who has the legal estate cannot have a receiver." In many of the States the mortgage is simply a lien on the land, no estate passing by it; hence the law cannot depend upon Lord Eldon's rule. American cases are reviewed.

Ibid.—9th February, 1883.

Evidence—Peculiarities of Handwriting, by JOHN D. LAWSON. Concluded in the following number. A collection of English and American cases upon the evidence of experts in handwriting and its admissibility.

Ibid.—23rd February, 1883.

Sealed Instruments Executed in Blank, by WM. L. MURFREE, Jr. A blank paper, signed and sealed, handed to an agent, with instructions to fill it up, does not constitute a deed. But where the substance of the intended instrument is drawn with blanks occurring in it and is sealed, the authorities are conflicting as to the effect when the blanks are filled. The weight of authority is in favour of holding such an instrument binding.

Ibid.—2nd March, 1883.

Grave Yard Law, by CHARLES BURKE ELLIOTT. A review of many English and American authorities on the subject of burials, etc.

Ibid.—9th March, 1883.

The Act of God, by WM. L. MURFREE, Sr. "This principle, it is believed, controls the question, and notwithstanding the very respectable authority to the contrary, the true rule may be stated thus: that antecedent negligence, misfeasance or malfeasance operating as a remote cause of the loss, will not preclude the carrier from claiming exemption from liability for such loss if it occurs proximately from the Act of God, but any immediate concurrent or contributory default or negligence will."

Ibid.—16th March, 1883.

The Admissibility of Evidence of Character in Civil Actions, by ELISHA GREENHOOD. Character as here used is synonymous with reputation. A witness may say of a person he has heard him "very little talked about," or "he never heard anything said against his character." The general rule is that evidence of character is inadmissible unless it is involved in the issue. When character forms the inducement to an agreement it is involved in the issue. The subject is then treated with reference to the actions for breach of promise and seduction, malicious prosecution and false imprisonment, libel and slander, and trespass.

Part Performance Entire Contract, by A. G. SCOTT. Some American cases are cited.

Entirety of Contract for Personal Services, by VANSYCKEL & WELLS. American cases are cited.

Ibid.—23rd March, 1883.

Contempt by Officers of the Court, by A. G. DONNER. The subject is treated with reference to Attorneys, Sheriffs, Receivers, Referees, Executors, Guardians, Administrators, and Clerks of the Courts. *Regina v. Wilkinson*, 41 U. C. R. 47, is cited for the proposition that it is a contempt for an attorney to write and publish strictures on the opinion of a Court in order to prejudice a cause!

Ibid.—30th March, 1883.

Married Women's Debts, by JOHN F. KELLY. The status of the married woman at Common Law is pointed out, and the history of her gradual emancipation from her immunity for debt is traced.

Mortgages and Powers of Sale, by ISAAC H. LIONBERGER. Mortgages as viewed at Common Law and in Equity are touched upon. Some cases on powers of sale are cited.

Ibid.—6th April, 1883.

Master and Servant, by J. M. KERR. The subject is treated under the heads of Risks of Employment, Injuries from Use of Defective Machinery, Care and Skill required of Master, Negligence of fellow-servants

Negligence of Master, Free transportation to and from his work, Unusual danger.

Has a Cheque-holder a right of action against a Bank ?
by E. B. NEWCOMB. Parsons and Daniels adopt as correct the authorities which hold that the holder has a right of action as long as the Bank has funds. The Supreme Court of the U. S. A. has held that there is no right of action, following *Foley v. Hill*, 2 H. L. C. 28, where it was held that the relation between a banker and customer is the ordinary relation of debtor and creditor with the superadded obligation to honour the customer's cheques.

Ibid.—13th April, 1883.

Evidence of Insanity as a Defence to Murder, by G. R. ELDRIDGE. "Assuming that in criminal cases, the burden is upon the defendant to prove his insanity, the question arises: What degree of evidence is required to establish the plea? There may be three answers to this question. It may be said, first, that the homicide must prove his insanity beyond a reasonable doubt; second, that he must show a preponderance of evidence in favour of his insanity; and third, that he must raise a reasonable doubt as to his sanity." These views are discussed. On the above assumption, it seems that the theory is of little matter as long as the jury are satisfied with the degree of proof.

When are Trustees Chargeable with Compound Interest ?
by EMLIN MCCLAIN. After a review of the cases, the learned writer concludes, "Generalizations are hardly safe, but it is evident that, first, to justify a compounding of interest against the trustee, there must be a breach of duty in the management of the fund * * ; secondly, where there is a breach of trust in failing to invest when that is the proper course, or in mingling the trust funds with private moneys in violation of duty, interest will be charged, but it will not be compounded for failure to invest, unless, perhaps, in cases of gross delinquency; nor for mingling with private funds, unless such funds are so used that profits are realized; in which case, if the profits are not disclosed so as to be recoverable by the beneficiary as such, compound interest will be given to cover what profits may have been realized."

Criminal Law Magazine.—January, 1883.

Comparative Criminal Jurisprudence, by FRANCIS WHARTON. In criticising the definition of crime, the learned writer says, "Of course, when there is a statute, that settles the question, and the statute, if constitutional, must be obeyed. But when the question comes up whether a particular act is an indictable offence at common law, then the answer should be in the negative, unless it should appear that a wrong is inflicted on the public which could not be redressed by private process. And this cannot be said of mere breaches of contract, for which civil remedies are the most appropriate." Degrees of responsibility are advocated. The learned writer reasons from the sliding scale of responsibility of infants according to age, and of persons committing crime while under the influ-

ence of intoxicants. The question of intention is then examined, and indictable evil intention is shown to be distinguishable from mere ineffective purpose, intermediate purpose, motive, aberration, and negligence or culpa. As to error, it is said that "in Germany * * a foreigner is not to be punished criminally for a police misdemeanor of whose character he could not be cognizant." Attempts are then dealt with.

Jury Trial, by JOHN D. BRANDON. The learned writer thinks the present jury system, as administered, is a reproach to free government, and a great obstacle to the proper administration of law, the defect being that the law requires unanimity in verdicts.

Ibid.—March, 1883.

The Peltzer Case, by FRANCIS WHARTON. A narrative of the case which occurred in Belgium is given, and the learned writer discusses several subjects in comparison with the English and American modes of trial. The examination of expert witnesses employed by the State is compared with our system, and the learned writer says, "We have, therefore, to conclude, that, while we might gain something in the way of authority in resorting to a system of special experts, we would not in this way secure unanimity." He also points out that a danger might arise from only one school of experts being appointed. With regard to the preliminary examinations of the prisoner, the learned writer says, "The only material difference that I can see is that we exclude statements made under influence of fear or expectations of official favour, while the proof of the application of such influence goes, under the modern Roman law, to credibility and not to competency." Hearsay and irrelevant testimony and leading questions appear to be permissible in an extraordinary degree in the Belgian system.

The Grand Jury, by DECIUS S. WADE. A review of the duties of the Grand Jury and the rights of parties before it.

Western Jurist.—March, 1883.

The Duties and Liabilities of Telegraph Companies, in respect to the transmission of full rate and also of half rate messages, where the blanks upon which the same are written contain conditions exempting the company from liability for errors or delays in unrepeatd messages, by J. C. MCNERNEY. A review of American authorities. In Iowa, Telegraph Companies are not common carriers, but may restrict their liability by reasonable rules not against public policy. Damages may be subject to the agreement of the parties. In other States, they are not common carriers, but may make themselves liable for the sending of messages, and in the absence of fraud or negligence the sum named in the contract will be the measure of damages.

Burden of Proof in Cases of Contributory Negligence, by ADDISON G. MCKEAN. A line of decisions, in which it has been held that the burden is on the plaintiff to establish that he was in the exercise of due care, is criticized, and the contrary opinion contended for, namely, that the case is complete when the defendant's negligence is established, and must be displaced by positive proof of the plaintiff's contributory negligence.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Judicial Committee of the Privy Council.*

MCLAREN v. CALDWELL.

Mr. Bethune.—There is another point which we have raised of very considerable importance, and which, so far as I know, now comes before your Lordships for the first time, and that is as affecting the jurisdiction of the Supreme Court of Canada to hear an appeal like this. The particular point which I am now stating was stated during the discussion in Parliament upon the bill.

Sir Arthur Hobhouse.—That they were going beyond their statutory powers?

Mr. Bethune.—Yes, in creating the Court. Very eminent lawyers take opposite views.

Sir Barnes Peacock.—You say the Court could not be established.

Mr. Bethune.—Not to entertain an appeal like this, depending wholly upon Provincial laws.

Sir Robert Collier.—That the Supreme Court could not entertain such an appeal as this.

Mr. Bethune.—Exactly. * * *

Mr. Bethune.— * * While the matter was before Parliament very eminent lawyers took different views about the power, some of them contending, as we shall contend here, that the power was limited to creating a court of appeal which should adjudicate upon Canadian questions. I may be a little tedious, but your Lordships will pardon me if I elaborate this so as to make my meaning plain. Unquestionably section 101 of the British North America Act, which contains the power, was borrowed

* Present :—The Right Hon. Sir Barnes Peacock, The Right Hon. Sir Robert Collier, The Right Hon. Sir Richard Couch, The Right Hon. Sir Arthur Hobhouse.

historically from the Supreme Court of the United States. It is the Act of 1867, 30-31 Vict. cap. 3. It reads thus:—"The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the constitution, maintenance and organization of a General Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the laws of Canada." Now, read in connection with that the provision which your Lordships find in section 92, subsection 14, "The administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts," that is to say, each Province might have just as many or as few Courts as it thought fit; and it was not merely Civil Courts; it creates a criminal jurisdiction; though they had no control over the procedure, yet they had the right to name the character of the Criminal Courts in which crime should be punished. The argument is that section 101 was passed for the purpose of enabling the Parliament of Canada to make just any additional Court for the better administration of its own laws, that is, for the laws of Canada, the laws passed by the Parliament of Canada; and I understand there has never been any dispute about the latter part of that; and also a power for the purpose of determining questions arising under Canadian laws, so that you might have uniformity of decision.

Sir Robert Collier.—There is no such expression in the Act.

Mr. Bethune.—No; there is nothing of the kind. The argument of the other side, no doubt, would be this, the maintenance and organization of a General Court of Appeal for Canada, it may be said, points to an appeal from Provincial Courts.

Sir Robert Collier.—Do you deny there is an appeal from Provincial Courts at all?

Mr. Bethune.—Yes; only in cases in which questions under Canadian laws arise. I say you must not overlook the end of that sentence, which more or less relates to the whole section—"for the establishment of any additional Courts for the better administration of the laws of Canada." I say that the word "Canada" there means just what it means in the former part of the section; that it does not mean the laws of the Province, but the laws that may be passed by Canada. There is at all events an argument on that point.

Sir Robert Collier.—You say there is an appeal in a certain class of cases and not in others.

Mr. Bethune.—Yes; I say that was borrowed by an exact analogy from the appeal to the Supreme Court at Washington.

Sir Robert Collier.—We have nothing to do with that; that is a totally different institution.

Sir Richard Couch.—What do you say are the laws of Canada which only are the subject of appeal?

Mr. Bethune.—Any law which may be passed by and in the proper competence of the Parliament of Canada.

Sir Richard Couch.—That would limit it very much.

Mr. Bethune.—No doubt.

Sir Barnes Peacock.—What words do you say limit it?

Mr. Bethune.—We say the words "for the better administration of the laws of Canada." These do not include the laws passed by the Province.

Sir Arthur Hobhouse.—That refers to additional Courts.

Mr. Bethune.—Yes; but we say that is additional to the General Court of Appeal.

Sir Richard Couch.—That is very inconsistent with the expression "General Court of Appeal."

Mr. Bethune.—Once you establish a Court of Appeal for hearing matters arising under Canadian laws, it must be general. You could not create a General Court of Appeal which would limit the right of hearing the appeals of that kind from one Province. It must be general.

Sir Robert Collier.—I do not see anything about Canadian laws here.

Mr. Bethune.—"For the better administration of the laws of Canada."

Sir Robert Collier.—That means the whole Province.

Mr. Bethune.—I submit not.

Sir Barnes Peacock.—You say that means all the laws of the Dominion Parliament.

Mr. Bethune.—Yes.

Sir Richard Couch.—That means Courts for the better administration of the laws of Canada.

Mr. Bethune.—We say there is a distinction drawn between Canada and the Provinces throughout. It seemed to me that the strict legal meaning of it was in that sense, otherwise there would be this result that you could have the Dominion Parliament creating concurrent Courts of competent jurisdiction even in the Provinces.

Sir Barnes Peacock.—It is not called the Parliament of Canada (Ontario?).

Mr. Bethune.—No; it is the Legislature of the Province; it is not called a Parliament at all.

Sir Barnes Peacock.—It is not called the Legislature of Canada now. Canada is now Ontario.

Mr. Bethune.—Part of old Canada is now Ontario.

Sir Barnes Peacock.—That is made Ontario, and Ontario has a Legislature of its own. The laws passed by that Legislature would be the laws of Ontario.

Mr. Bethune.—Exactly; and therefore we say that this is technically confined to such laws as may be passed by the Parliament of Canada.

Sir Robert Collier.—You say the Supreme Court cannot entertain any appeal with regard to the construction of any Provincial law.

Mr. Bethune.—Yes.

Sir Robert Collier.—I am afraid if that is so, many of our decisions have been altogether wrong.

Mr. Bethune.—Your Lordships would have the general power that has never been taken away.

Sir Barnes Peacock.—If the Court had no jurisdiction we could not uphold a decision of that Court, and we have upheld many cases.

Sir Richard Couch.—The expression here is "laws of Canada," and by section 4 the name Canada is taken to mean as constituted under this Act.

Sir Barnes Peacock.—That is the Dominion.

Mr. Bethune.—You have, of course, to take concurrently with that, and going side by side with it, the further fact that there are laws of the Provinces—each Province apart from the other.

Sir Barnes Peacock.—Did you argue this point?

Mr. Bethune.—No; because it was too late to argue it; the thing had been assumed long before.

Sir Robert Collier.—You might have argued it before the Supreme Court of Canada.

Mr. Bethune.—No; we could see that it was quite useless, because they had from the beginning asserted their jurisdiction.

Sir Robert Collier—I am afraid so have we decided the same thing.

Mr. Bethune.—Your Lordships have had it discussed so often, that I am sure I cannot help you in arriving at any conclusion even favourable to the side I represent. I do not know that I need trouble your Lordships with any further observations upon the matter. * * *

SIR BARNES PEACOCK (in delivering the judgment of their Lordships, granting leave to appeal).— * * There is one other point to which their Lordships wish to allude, that is, the objection which has been made to the jurisdiction of the Dominion Parliament to pass the law with reference to the Supreme Court of Canada, and also the power of the Supreme Court of Canada to entertain such an appeal as this, which involves a question of the construction of the Acts of the Provincial Parliament. Their Lordships do not think there is any ground for allowing that question to be raised on the hearing of the appeal.

In the Supreme Court of Canada.

EXCHEQUER COURT.]

[MAY, 1883.]

REGINA v. McLEOD.

Petition of Right—Government Railway—Negligence—Crown not Common carriers.

The suppliant purchased a first class ticket to travel from Charlottetown to Souris, on the Prince Edward Island Railway, which is owned by the Dominion of Canada and worked under the management of the Minister of Railways, and whilst on his journey he sustained serious injuries, the result of an accident to the train. The learned Judge at the trial found "that the road was in a most unsafe state from the rottenness of the ties, and that the safety of life had been recklessly jeopardized by running trains over it with passengers, and that there had been a breach of the contract, entered into by Her Majesty through her authorized agent, to convey suppliant safely and securely on said journey," and he awarded \$36,000 damages.

Held, Fournier and Henry, JJ., dissenting, that the establishment of Government Railways in Canada is a branch of the public service, created by statute for purposes of public convenience, and not entered into

or to be treated as private mercantile ventures, and therefore that a petition of right does not lie against the Crown for injuries resulting from the nonfeasance, misfeasance, wrongs, negligence, or omissions of duty of the subordinate officers or agents employed in the public service.

Held, also, that the Crown, not being a common carrier, is not liable for the safety and security of passengers using Government Railways.

Lash, Q.C., and *Hodgson, Q.C.*, for the Crown.

Davies, Q.C., and *A. F. McIntyre*, for the respondent.

QUEBEC.]

BANK OF TORONTO v. PERKINS.

The Banking Act—Advances on Real Estate.

B., on the 18th January, 1876, transferred to the appellants by notarial deed an hypothec on certain real estate in Montreal, made by one C. to him, as collateral security for a note which was discounted by the appellants and the proceeds placed at B's credit on the same day on which the transfer was made. The action was brought by the appellant against the insolvent estate of C., to set aside a prior hypothec given by C. and establish their priority over it.

Held, affirming the judgment of the Court of Queen's Bench, that the transfer by B. to the appellant was null and void as being in contravention of the Banking Act, 34 Vict. cap. 5, sec. 40.

Laflamme, Q.C., for the appellant.

Benjamin, for the respondents.

BAIN v. THE CITY OF MONTREAL.

Assessment for flagstone paving—Resolution of City Council—Validity of proceedings—Payment without protest—37 Vict. cap. 51, sec. 192 (Q.)—C.C., Arts. 1047, 1048.

Under 37 Vict. cap. 51, sec. 192 (Q.) the respondents' Council, adopting the reports of the road and finance committees, ordered a flagstone paving to be laid in front of the appellants' property amongst others, half of the cost to be paid by means of a special assessment on the proprietors and usufructuaries in proportion to the frontage of their properties. The appellant was assessed on 27th January, 1877; and during 1877 and 1878, she paid the assessment, including interest, in three instalments, two payments being made after notice and request given and made under the above act, and the third without notice. She made the payments without protest or reserve, and without objecting to the construction of the pavement. The action was brought to recover the amount so paid.

Held, affirming the judgment of the Court below, Henry and Gwynne, JJ., dissenting, that the presumption was that when the appellant paid the amount of the assessment, she was aware of the grounds on which she now relied to recover the amount, and that the payments were not made through error nor under *contrainte*, but voluntarily.

Held, also, that the respondents in laying pavements in parts of the City only, the cost of which was to be paid by assessment according to the frontage of the respective properties and not in proportion to the cost of the part laid opposite each property, were acting within the scope of the power conferred upon them by 37 Vict. cap. 51, sec. 192.

Barnard, Q.C., and *Creighton* for the appellant.

Roy, Q.C., for the respondents.

SHAW v. ST. LOUIS.

Appeal to Supreme Court of Canada—Final judgment as to part of demand.

The respondent claimed of the appellant \$2,125.75 balance due on a building contract. The appellant denied the claim, and by incidental demand claimed \$6,368, for damages resulting from defective work. On 27th March, 1877, the Superior Court gave judgment in favour of the respondent for the whole amount of his claim dismissing the appellant's incidental demand. This judgment was reversed on Review on 29th December, 1877. On 24th November, 1880, the Court of Queen's Bench held that the respondent was entitled to the balance claimed by him from which should be deducted the cost of re-building part of the defectively constructed work, in order to ascertain which the case was remitted to the Superior Court by whom experts were appointed to ascertain the damage, and on their report the Superior Court on 18th June, 1881, held, that it was bound by the judgment of the Court of Queen's Bench, and, deducting the amount awarded by the experts from the balance claimed by the respondent, gave judgment for the difference. This judgment was affirmed by the Court of Queen's Bench on 19th January, 1882.

Held, on appeal, that the judgment of the Queen's Bench of the 24th November, 1880, was a final judgment as to the merits, that the Superior Court when the case was remitted to it rightly held that it was bound by that judgment, and that the respondent was entitled to the balance thereby found due to him.

W. H. Kerr, Q.C., for the appellant.

Doutre, Q.C., and *Ouimet, Q.C.*, for the respondent.

G. T. R. CO. v. WILSON.

Verdict—Motion for judgment on Verdict—Motion for new trial—34 Vict. cap. 4, sec. 10 (Q).

The respondent obtained a verdict from a jury in the Superior Court, District of Iberville, for injuries caused by the negligence of the appellants. The motion for judgment on the verdict was not made before the Superior Court, District of Iberville, but was drawn up and placed in the record

while the case was pending before the Court of Review at Montreal. That Court on motion thereupon directed a new trial, but the Court of Queen's Bench, on appeal, held that the jury having found that the respondent was lawfully on the highway when the accident occurred, and that the appellants could by the exercise of ordinary care and diligence have avoided it, rejected the motion for a new trial and directed judgment to be entered for the respondent.

Held, Taschereau and Gwynne, JJ., dissenting, that the Court of Queen's Bench was right.

Per Taschereau and Gwynne, JJ. The Superior Court sitting in Review at Montreal in the first instance having ordered a new trial on motion therefor, the Court of Queen's Bench should not have reversed that order.

Per Taschereau, J. The Superior Court sitting in Review at Montreal had no jurisdiction to determine a motion for judgment upon the verdict in a case tried in one of the rural judicial districts, and therefore the Court of Queen's Bench had no power to enter judgment for the respondent upon the verdict.

Strachan Bethune, Q.C., and *McRae* for the appellants.

Carter, Q.C., and *L. H. Davidson*, for the respondent.

V. HUDON COTTON CO. v. CANADA SHIPPING CO.

Sale by agent—Undisclosed principal—Tender and payment, plea of.

Action by the respondents to recover the price of a cargo of 810 tons of coal sold by T. M. & Co., their agents through N., a broker. The bought and sold notes stated that the coal, 810 tons, was sold to arrive at \$3.75 per ton of 2240 lbs., "buyer to have privilege of taking bill of lading or re-weighing at seller's expense." T. M. & Co. were known to be general agents of the respondents. The appellants elected to take the coal as per bill of lading without having it weighed, but three weeks later, on weighing it in their own yard, without notice to the vendors, they found the cargo to contain only 755 tons, 580 lbs. The appellants pleaded that their contract was with T. M. & Co., and that the respondents had no action; and by a second plea they alleged that they had offered part of the amount claimed to T. M. & Co., which they tendered to the respondents without acknowledging their liability, which sum they now brought into Court.

Held, affirming the judgment of the Court of Queen's Bench, Fournier and Henry, JJ., dissenting, 1. That by their plea of tender and deposit in Court the appellants had acknowledged their liability to the respondents on the contract. 2. That under the circumstances, the appellants were precluded by their agreement from claiming a reduction in the price for the deficiency in quantity.

Trenholme and *Béique* for the appellants.

Laflamme, Q.C., and *Davidson, Q.C.*, for the respondents.

GIRALDI v. LA BANQUE JACQUES CARTIER.

Agency—Payment—C. C. art. 1143—Parties.

S. Giraldi acquired during the life of his first wife, M. A. Bosna, certain immoveable property which formed part of the *communauté de biens* existing between them. At his death, after his marriage with Henrietta Senecal, his second wife, he was greatly involved. His widow, H. S., having accepted *sous bénéfice d'inventaire* the universal usufructuary legacy made in her favour by S. G., continued in possession of her estate as well as of that of M. A. Bosna, the first wife, and administered them both, employing one G. to collect, pay debts, etc. Shortly afterwards, at a meeting of S. G.'s creditors, of whom the respondents were the chief, a resolution was adopted authorizing H. S. to sell and licitate the properties belonging to the estate of S. G., with the advice of an advocate and the cashier of the respondents, two of the creditors, and promising to ratify anything done on their advice, and they resolved that the moneys derived from the sale or licitation of the properties should be deposited with the respondents to be apportioned amongst S. G.'s creditors *pro rata*. G. continued to collect the fruits and revenues and rents, and acted generally for H. S., and under the advice aforesaid, and deposited both the moneys derived from the estate of S. G. and those derived from the estate of M. A. Bosna, the first wife, with the respondents, under an account headed "Succession S. Giraldi." A balance remained after some cheques thereupon had been paid, for which this action was now brought by the heirs and representatives of Dame M. A. Bosna.

Held, per Strong, Taschereau and Gwynne, JJ., (Ritchie, C.J., and Fournier and Henry, JJ., contra), that, as between the heirs Bosna and the Bank there was no relation of creditor and debtor, nor any fiduciary relation, nor any privity whatever: and as the moneys collected by G. belonging to the heirs Bosna were so collected by him as the agent of H. S., and not as the agent of the Bank, and as the representatives of H. S. were not parties hereto, the appellants could not recover the moneys sued for.

Trenholme and Béique, for the appellants.

Globensky, Q.C., for the respondents.

HARRINGTON v. CORSE.

Will, construction of—C. C. Art. 889—Direction of testator to pay debts—Legatee of hypothecated property—Liability of.

On 30th April, 1869, H. S. being indebted to J. P. in \$3,000, granted to him an hypothec on certain real estate. On 28th June, 1870, H. S. made his will, which contained, amongst others, the following clause:—"That all my just debts, funeral and testamentary expenses be paid by my executors, etc." By another clause, he left to W. H., the appellant in usufruct and to his children in property, the real estate which he had hypothecated.

Held, reversing the judgment of the Court of Queen's Bench, Strong, J., dissenting. 1. That the direction to pay debts included the debt of \$3,000 secured by the hypothec. 2. That under art. 889 of the Civil Code a particular legatee is not liable, without recourse against the heir or universal legatee, for a debt of the testator secured by hypothec on the immoveables bequeathed to him.

Doutre, Q.C., for the appellant.

Strachan Bethune, Q.C., and *Robertson*, for the respondent.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 29TH MAY, 1883.]

JACKSON v. CASSIDY.

Promissory note—Attachment.

Held, affirming the judgment of Armour, J., that a negotiable promissory note not yet due is not a debt which may be attached within the meaning of Rule 270.

Arnoldi, for the appeal.

Aylesworth, contra.

CHANCERY DIVISION.

[BOYD, C., AND FERGUSON, J., 11TH JUNE, 1883.]

HOPKINS v. HOPKINS.

Will, construction of—Devise of rents to witness—Statute of limitations.

Held, affirming the judgment of Proudfoot, J., 2 C. L. T. 596, that a will devising rents, being a devise of a tenement within the meaning of the Statute of Frauds, requires to be witnessed, and therefore, that where a witness to the will is the devisee it fails under 25 Geo. II. cap. 6.

Held, also affirming the judgment, that the perception of the rents by the devisee for a sufficient time, according to the Statute of Limitations, under the belief that he was entitled thereto, barred the heirs-at-law of the deceased.

[PROUDFOOT AND FERGUSON, JJ., 11TH JUNE, 1883.]

FOLEY v. THE CANADA PERMANENT L. & S. CO.

Infant, mortgage by—Acquiescence—Ratification.

Held, affirming the judgment of Boyd, C., 2 C. L. T. 594, that an infant is bound expressly to repudiate his contracts within a reasonable time after attaining his majority, and if he neglect to do so his silence will amount to an affirmation thereof.

Held, also that the lapse of time in this case was unreasonable, and that the plaintiff had expressly acknowledged his liability on the mortgage after majority.

Moss, Q.C., for the appeal.

W. Cassels and *Leonard*, contra.

[THE CHANCELLOR, 6TH JUNE, 1883.]

FALKINER v. THE GRAND JUNCTION RAILWAY CO.

By-law retaining solicitor—Power of shareholders to repeal—Fixed salary.

The plaintiff was, in 1874, appointed solicitor to the defendants on an understanding that he should be remunerated for his services by payment of a fixed sum to be determined at a subsequent period. In January, 1878, the defendants' directors passed a by-law which formally ratified the plaintiff's appointment, and provided for his compensation at the rate of \$1,000 per annum from the date of appointment. This by-law the shareholders assumed to repeal at a meeting held a few months later.

Held, that the directors in passing the by-law, acted within their authority under C. S. C. cap. 66, sec. 47; that the shareholders had no power to rescind the by-law as to the remuneration for past services, and that it should be the measure of the value of the plaintiff's services during its currency; that the agreement to pay a fixed sum as a yearly salary in lieu of paying items in detail was not illegal whether providing for the past or the future.

 COLE v. CAMPBELL.
Action in Chancery Division—Interpleader issue tried at Assizes—Motion for new trial.

An interpleader issue arising out of an action in the Chancery Division was directed to be tried at the Assizes, and the jury having found a verdict which the plaintiff desired to move against, a motion was made before a single Judge for a new trial, on the ground that the verdict was against evidence, or to enter a verdict for the plaintiff in the issue.

Held, that motion should be made before the Divisional Court.

Stonehouse, for the motion.

 MAGURN v. MAGURN.
Alimony—Canadian subject—Foreign marriage and divorce—Validity of.

The defendant, a Canadian subject by birth, left his home at Kingston and went to the United States of America, where he remained for some years engaged in business, but having no fixed place of abode, though residing for a time in St. Louis, Missouri. He married the plaintiff at Detroit, in the State of Michigan, and she accompanied him on his business travels, for a year and some months. She then went to his father's house, at Kingston, in Canada, where a child was born. She then travelled with her husband in the United States for a while, when he rented a house in Kingston, where they lived for about a year and a half, and where a second child was born. The defendant then rented a house in St. Louis, Missouri, which he said was to give his wife a permanent home, and where they lived for a while. At the end of a year from this date he took her to St. Joseph, Missouri, where, after a few days, he left her in lodgings and returned to St. Louis. After a year's separation, he obtained a divorce, on default of appearance to his petition

therefor, after personal service on the wife, on the ground that his wife had absented herself without reasonable cause, for the space of one year. He married again, in the United States, the same year, and went to England, to which country he said he had for years intended to go. After a short residence there, he returned with his family to Toronto, Canada, where he remained till this action was brought for alimony. The Court was of opinion that the defendant's residence in St. Louis was merely for the purpose of giving jurisdiction to the local divorce Court.

Held, that the defendant had never abandoned his domicile of origin; that the plaintiff upon her marriage acquired the status of a Canadian wife with all the rights and privileges incident thereto, and that the ground of the divorce not being one which would suffice in Canada, the plaintiff was not affected by the Missouri decree of divorce, and was therefore entitled to alimony.

CLOW v. CLOW.

Will, construction of—Life estate—Waste.

The testator devised certain land as follows:—"I devise unto my wife for and during her natural life [describing the land]. I also will and bequeath to her everything real and personal within and without, and it is hereby understood that the property above described shall be under the control of my said beloved wife. After the demise of my wife, the aforesaid real estate shall descend to my nephew and his heirs."

Held, that the widow, the life tenant, was punishable for waste, notwithstanding the words respecting her control of the land.

BANK OF OTTAWA v. McMORROW.

Promissory note—Repeal of Stamp Act—Interpretation Act—Effect of—Evidence.

The plaintiffs, before 4th March, 1882, became the holders of a promissory note, made by the defendant on 6th January, 1882, payable at four months. The note was insufficiently stamped when the plaintiffs acquired it, and so remained until after the repeal of the Stamp Act, when, on 29th June, 1882, they affixed double stamps to it.

Held, that the right of the holder of a promissory note, insufficiently stamped, to affix double stamps, is an inherent right existing during the currency of the instrument and accompanying its possession, and, upon the repeal of the Stamp Act, by 45 Vict. cap. 1, was therefore saved by the Interpretation Act, 31 Vict. cap. 1 sec. 3, and sec. 7, sub-sec. 36.

The defendant swore that the note was not stamped when he signed it, and that he stated that fact to an officer of the plaintiff, before action, while the latter swore that he did not recollect any such communication.

Held, that the *onus* was on the defendant to establish (i) that the note was defective, and (ii) that this was so intelligibly communicated to the Bank, that it could be said that they acquired the knowledge at the time alleged by the defendant; but that it would be unsafe to accept his unsupported testimony to the fact, notwithstanding the general rule as to belief of affirmative evidence.

[19TH JUNE, 1883.]

NORTH OF SCOTLAND CAN. MORTGAGE CO. v. BEARD.

Mortgage—Reference—Precipe judgment—Immediate execution.

In an action on a mortgage where a reference to the Master to take accounts, etc., was desired, the Registrar refused to insert a clause in the *precipe* judgment ordering immediate payment of the amount claimed by the writ.

W. Barwick now moved for a direction to the Registrar to insert the clause on the ground of urgency, as the amount was large and the plaintiffs desired to issue execution as speedily as possible. He submitted that the judgment should go for the amount now due, subject to be increased by the interest accrued to the time of making the report, and costs when taxed.

THE CHANCELLOR refused the direction, holding that the Registrar should follow the usual course of inserting a clause ordering the defendant to pay the amount found due to the plaintiffs by the Master forthwith after the making of the report; and that the order asked for could only be made on motion to the Court for judgment, and then only on special grounds.

[20TH JUNE, 1883.]

*In re SMITH.**Tenant for life—Repairs.*

The expenditure of a tenant for life upon buildings cannot be allowed to him and charged upon the inheritance.

[WILSON, C. J., 6TH JUNE, 1883.]

EDWARDS v. MORRISON.

Mortgage—Priority—Notice.

R. M. the owner in fee simple of the lands in question mortgaged them to the C. P. L. & S. Co., his wife joining to bar dower, and four years afterwards conveyed them to W. to the use of M. M. his wife. He then, notwithstanding this deed, again mortgaged twice successively to the Company for the debt covered by the first mortgage which remained undischarged and M. M. then joined to bar dower. The solicitor of the Company treated the conveyance to the wife as voluntary and of no consequence. R. M. then mortgaged to F. and G., the latter assigning to the plaintiff who did not register his assignment, and in each case M. M. joined to bar dower. R. M. and M. M. his wife then jointly mortgaged to the plaintiff who now claimed priority over the Company's second and third mortgage and that of F. All the instruments with the exception of the assignment were registered, and the plaintiff had notice of them and of the state of the account between R. M. and M. M. and the Company. Before the mortgages to F., G. and the plaintiff W., R. M. and M. M. released in fee to the Company, until payment of the third mortgage to the Company, and on payment then to R. M. in fee, but this was registered after all the above instruments, and the plaintiff had no notice of it, and was told by the Company's Solicitor that no such instrument existed.

Held, that the plaintiff's knowledge of the apparent defect in title enabled the Company having the legal estate under the first mortgage to maintain their priority, that the second and third mortgages to the Company might be treated as statements of account between R. M., M. M. and the Company, and that as the plaintiff took his mortgage with knowledge that the Company claimed a debt charged upon this land, he could not take priority over it.

McMichael, Q.C. and *A. Hoskin*, Q. C., for the plaintiff.

Lash, Q.C., and *Leonard*, for the defendant Company.

MARTIN v. MILES.

Mortgage—Tenant for years—Right to redeem.

The plaintiff was tenant for years of lands mortgaged by C. to the defendant under a lease made after the mortgage. The defendant foreclosed C. without making the plaintiff a party, and the latter now sought to redeem. After the foreclosure he offered to give up possession on receipt of \$40, but this offer was not accepted. The defendant by parol refused to acknowledge the plaintiff as her tenant and agree to sell to one K. without regard to the plaintiff's lease.

Held, that the plaintiff, as tenant for years having a beneficial lease, had the general right to redeem as long as the mortgagee refused to recognize him as tenant, and that the plaintiff had not forfeited that right by his unaccepted offer to give up possession, but that the defendant had still the right to assent to the lease subject to the question of costs.

But it appeared that the plaintiff made an agreement with C. after foreclosure, under which the latter was to find the money for the proposed redemption, and the plaintiff agreed to exercise his right to redeem and to convey the land to the person advancing the money, would allow his name to be used for the purpose of redemption, would not extinguish the lease, nor give up possession before redemption, that C. was to pay the costs of the action, and to pay \$80 to the plaintiff for his loss of time, but not if he elected to remain in possession for the residue of his term under the lease.

Held, that though there was nothing to prevent C. from taking an assignment of the lease after the foreclosure, or prosecuting the action in the lessee's name, he could not make use of the lease to open foreclosure after the sale to K., and the readiness of the defendant now to confirm the lease.

Arnoldi, for the plaintiff.

H. T. Beck, for the defendant.

VARDON v. VARDON.

Alimony—Power of plaintiff to compromise—Specific performance of agreement to compromise—Agreement by solicitor.

A wife having commenced an action for alimony has power to compromise it.

Where an action for alimony was compromised by a separation being agreed upon, and certain covenants entered into by the wife, and the husband was to convey a piece of land to her as her part of the agreement, and the wife had executed the necessary documents, but the deed of separation had not been executed.

Held, that she was entitled to specific performance of the agreement to convey the land to her.

The solicitors of the parties were corresponding with a view to settlement. Pending the correspondence the defendant (the husband) was told by his solicitors that negotiations were not complete and no settlement had been arrived at. The defendant then, without instructing his solicitors to break off negotiations, wrote to his wife as follows:—"I find by my lawyers on yesterday, that neither of the offers that I have made is satisfactory, and I have made up my mind to change and make you one more offer, and that is to wind up your business and come home as soon as possible and I will provide as good a home as possible." This letter was received by the plaintiff before the solicitors had come to terms. In ignorance of it they concluded an agreement.

Held, that as the letter was not a plain abandonment of the former offers, nor a withdrawal from his solicitor of the power which he had to make a settlement, that he was therefore bound by the settlement made by his solicitor.

Geo. Tate Blackstock, for the plaintiff.

Bain and W. Seton Gordon, for the defendant.

[PROUDFOOT, J., 7TH JUNE, 1883.]

COWAN v. BESSERER.

Will, construction of—Estate durante viduitate—Power of appointment—Dower—Election—Bequest for maintenance—Account.

A testator devised lands to his wife "to be held and enjoyed by her so long as she shall remain unmarried. After my decease and after her decease, or in the event of her marrying again, then from and after such second marriage, I will and devise the said dwelling house and premises unto my son who shall be named by my said wife by deed under her hand and seal." The widow married a second time without having exercised the power of appointment.

Held, that she might still exercise the power.

Lands were devised to the wife to sell and apply proceeds for payment of the testator's debts, and for the maintenance of herself and his minor children and the education of the minors as she should see fit, and in the event of any of the lands remaining unsold when the youngest child attained 21 they should be subject to the trusts of the will.

Held, that the wife took absolutely the proceeds of the sale not required for the payment of debts and the maintenance of herself and the minor children, without liability to account.

Held, also, that the personal use and occupation of certain lands being inconsistent with a claim for dower barred the widow of her dower in that parcel, but the devise of the rents issues and profits of another parcel till the youngest child attained 21 was not inconsistent with the claim for dower therein, and did not put the widow to the election in respect thereof.

J. H. Macdonald, for the plaintiff.

Lash, Q.C., G. H. Watson, and McTavish, for adult defendants.

Plumb, for the official guardian.

EDWARDS v. PEARSON.

Will, construction of—Legacies—Cumulative or substitutional.

The testator bequeathed to his wife "the sum of \$150 annually during the remainder of her natural life, or so long as she may remain my widow, the said sum to be accepted by her in lieu of dower, the said yearly allowance to be a lien upon my real estate and to be paid my said wife as she may need it, either quarterly or half-yearly." After a direction to his executors to sell his realty and personalty, and pay debts, etc., he gave two legacies, and proceeded, "the balance then remaining to be divided between my three sons, subject to each of them securing to his mother an annual payment of \$50 during the remainder of her natural life the security to be satisfactory to her and my executors."

Held, that the sums to be secured by the sons, in all \$150, if they could be deemed one legacy, were cumulative to, and not a repetition of, the annuity in lieu of dower, on account of the difference in mode of payment and securing the same, etc., and that the insufficiency of the estate to answer all the legacies was not a sufficient circumstance to vary this construction.

TOOMEY v. TRACEY.

Will, construction of—Mixed fund—Payment of legacies—Interest on legacies.

A testator directed his executors to pay his debts and funeral expenses out of his personal property, but if that proved insufficient they were authorized to sell enough realty to make up the deficiency. He then directed his land to be sold, and ordered the interest of all capital arising from the sale to be paid yearly to his wife for her maintenance during her natural life. He then gave a number of legacies. A special case was presented for the opinion of the Court.

Held, (i) that if the personalty was not sufficient for payment of debts, then the legacies were payable out of the proceeds of the land, but if sufficient, out of the mixed fund created by the testator; (ii) that the legacies, from the words used, were present gifts and did not form part of a trust to be executed *in futuro*, and therefore that they bore interest from the expiration of a year from the testator's death.

J. J. Foy, for the plaintiff.

C. C. McCaul, for the executors.

W. Fitzgerald, for the heir at law.

IN CHAMBERS.

[THE CHANCELLOR, 7TH JUNE, 1883.]

REW v. ANTHONY.

Service of writ on infants out of jurisdiction.

This was an action on a mortgage against infants claiming under the mortgagor. They were living out of the jurisdiction of the Court at the time of the beginning of the action, and personal service was effected upon

them. The taxing officer disallowed the costs of service, on the ground that service upon the official guardian would have been sufficient.

J. H. Macdonald, for the plaintiff, appealed from this ruling.

Harcourt, for the official guardian, showed cause.

Held, affirming the ruling of the taxing officer, that the old Chancery practice prevails, and that service upon the official guardian is sufficient.

(Reported by F. W. Harcourt, Esq.)

[11TH JUNE, 1883.]

FELL v. WILLIAMS.

Judgment under Rule 80—Practice.

Held, affirming the judgment of the Master in Chambers, that on a motion for judgment, under either Rule 80 or 322, the plaintiff's case must appear as a demonstration, and nothing is to be supplied by the imagination or rest upon probability alone. Therefore, where the defendant set up a matter which might possibly afford a defence against the plaintiff, the Court refused to criticize or enter into the probabilities of the defence, and refused a motion for judgment.

Held, also, that the plaintiff cannot succeed under Rule 80, where something beyond the recovery of money is sought.

Walter Read, for the appeal.

Shepley, contra.

MCLEAN v. THOMPSON.

Notice of trial by one defendant.

Action in the Chancery Division by the plaintiff against several defendants to set aside a judgment as being fraudulent and void against creditors. Notice of trial was given by one of the defendants for the June Assizes at Toronto. The plaintiff moved to set aside the notice of trial upon the grounds (i) That a case in the Chancery Division cannot be set down as of right for trial at the Assizes. (ii) That one of several defendants cannot give notice of trial.

The Master in Chambers held, following *Rymal v. McEachren*, 3 C. L. T. 106, that the notice of trial was regular, and dismissed the motion.

The plaintiff appealed.

A. C. Galt, for the plaintiff, argued that *Rymal v. McEachren* was inapplicable, as in that case the plaintiff gave the notice; and the circumstances, which do not appear in the report, warranted an order for a speedy trial. There is nothing in the Judicature Act to warrant a defendant in serving a co-defendant with notice of trial, and the fact that there is no such case in the English Reports strongly corroborates this view. The words of the statute allow "either party" to give notice of trial; but this should not be read as "any party."

Plumb, contra. The intention of the statute was that as soon as the pleadings are closed, any party to the record should be at liberty to have the case disposed of. The defendant in question was quite regular in his proceeding, as appears by *Rymal v. McEachren*, and, as the other defen-

dant was in a position to join in the notice, and does not now object, it cannot be urged that this is a case of a single defendant insisting on rights as against both the plaintiff and a co-defendant.

The CHANCELLOR dismissed the appeal with costs, holding that the defendant was entitled to give notice of trial to the plaintiff and his co-defendant.

(Reported by A. C. Galt, Esq., Barrister-at-Law.)

[PROUDFOOT, J., 7TH JUNE, 1883.

MILLER v. BROWN.

Leave to appeal after expiry of time—Vested right—Special circumstances.

An action for redemption in which judgment went for the plaintiff to redeem. The defendant now applying resided in England, and her affairs were managed here by an agent, who was her solicitor in this cause. After examining into the accounts for some time with a view to putting in the accounts in the Master's office, the solicitor consulted counsel, who advised him to appeal from the judgment. An application was then made for leave to appeal, although the time had expired.

Held, that the plaintiff had acquired a vested right under the judgment, and the difficulties in the defendant's way and her residence in England were not such special circumstances as to induce the Court to deprive the plaintiff of his right to hold the judgment.

S. H. Blake, Q.C., for the motion.

Hoyles, contra.

[ARMOUR, J., 8TH JUNE, 1883.

WESTERN CANADA PERMANENT L. & S. CO. v. DUNN.

Action for recovery of land, under a mortgage in default, against the mortgagor and the infant assignees of his equity of redemption. The mortgagor did not appear. The official guardian appeared and delivered a defence, setting up that the plaintiffs had been endeavouring to sell the property under the power of sale in their mortgage but that their efforts had so far been unsuccessful, that the infants had no means of paying off the mortgage except by means of a sale of the land, and they submitted that the land should be sold under the direction of the Court according to the practice in mortgage actions in the Chancery Division.

Frazer Lefroy moved to strike out the defence, and for leave to enter judgment as for default of a defence.

W. H. P. Clement showed cause.

The Master in Chambers struck out the defence and directed judgment to be entered for the plaintiffs for possession of the land.

ARMOUR, J., rescinded the order of the Master in Chambers, and directed that upon payment into Court to the credit of the action, within ten days, of the sum of \$80, to cover the expenses of a sale, the usual enquiries should be made, accounts taken, and costs taxed for an immediate sale of the land. Reference to the Master therefor. Order for immediate possession.

Leave to apply in Chambers to dispense with payment into Court of the deposit.

An application subsequently made to the Master in Chambers for an order dispensing with payment into Court of the deposit was refused, and his decision was affirmed on appeal.

(Reported by F. W. Harcourt, Esq.)

[ARMOUR, J., 5TH JUNE, 1883.]

MACNEE v. ONTARIO BANK.

Division Courts—High Court procedure—Prohibition.

On the 17th May, 1883, the Division Court Judge of the County of York made an order that William K. Rankin, a witness, on behalf of the defendants, be examined before a special examiner at Toronto, the examination so taken to be filed according to the usual High Court practice, and received and given in evidence on the trial of this cause saving all just exceptions.

On the 23rd May, 1883, the plaintiff moved before the Judge of the Division Court to set aside the order on the ground (amongst others) that the learned Judge had not any jurisdiction to make it, and the motion was dismissed.

The plaintiff then applied for a writ of prohibition to prohibit said Division Court from proceeding under the order, and from admitting the evidence taken.

G. Bell, for the motion.

W. Barwick, for defendants.

The Judicature Act, secs. 77 and 80, and Rule 285; the Division Courts Act sec. 244; *Re Fletcher v. Noble*, 9 P. R. 255; *Jones v. Jones*, 17 L.J. Q.B. 170 were referred to.

Held, (i) that the Division Court Judges may in their discretion apply the rules of the Judicature Act to the Division Courts.

(ii) That the learned Judge had jurisdiction to make the order complained of.

(Reported by Geo. Bell, Esq., Barrister-at-Law.)

[CAMERON, J., 15TH JUNE, 1883.]

FLETCHER v. NOBLE.

Division Court action—Costs—Action in the High Court for same cause—Security for costs of Division Court action.

In an action in the Division Court on a promissory note, security for costs was directed to be given by the plaintiff who was resident out of the jurisdiction. A prohibition was refused, it being held that security might be ordered in such a case (2 C. L. T. 556), and the plaintiff was ordered to pay the costs of his motion for a prohibition. The action in the Division Court was dismissed, the order for security not having been complied with. The plaintiff did not pay the costs of the prohibition or of the Division Court action. He then, while still resident out of the jurisdiction, brought

this action on the note sued on in the Division Court and two others. A motion was made to stay proceedings until security for costs should be given, and until the costs of resisting the motion for prohibition should be paid.

Held, that the defendant was entitled to the order on both grounds.

Gould, for the motion.

Hands, contra.

(Reported by C. R. Gould, Esq., Barrister-at-Law.)

[THE MASTER IN CHAMBERS, JUNE, 1883.]

MILES v. CAMERON.

Opening foreclosure—Negligence of mortgagor.

The defendant, who was in default on a mortgage to the plaintiff, was guilty of great delay and negligence when notified by the mortgagee's solicitor to pay arrears. He made several appointments and promises to pay, but kept none of them. After great forbearance, the plaintiff's solicitor entered judgment of foreclosure. The defendant then moved to open foreclosure and to be allowed to redeem, showing that the property was much more valuable than the full amount of the plaintiff's claim, and that he was prepared to raise the money and pay it off.

Held, that the foreclosure should not be opened, on account of the defendant's negligence, notwithstanding the loss consequent on foreclosure.

Arnoldi, for the motion.

W. Fitzgerald, contra.

Division Court, York.

BUILDING AND LOAN ASSOCIATION v. HEIMROD.

Division Courts—High Court Practice—Non-suit.

The practice of the High Court of Justice is not expressly made applicable, by the Judicature Act and Rules, to the Division Courts, though those Courts may, as far as their machinery allows them, grant any substantial relief or remedy that the High Court could grant.

Held, that as non-suits are expressly provided for by the Division Courts Act, Rule 330 of the Judicature Act, which makes a non-suit a judgment on the merits, is not applicable to Division Courts, and that it cannot be applied in the discretion of the Judges of those Courts.

The facts appear in the judgment.

Allan Cassels, for the plaintiffs.

T. P. Galt, for the defendant.

McDOUGALL, JUN. J.—This is an action brought to recover the premium for an insurance effected by the plaintiffs upon some property of the

defendant of which the plaintiffs are mortgagees. The mortgage is made in pursuance of the Short Forms of Mortgages Act, R. S. O. cap. 104, and contains the usual statutory covenants.

The first objection taken by the defendant to the plaintiffs' right to recover is that the plaintiffs had been non-suited in a former action brought against him by the same plaintiffs in this Court for the same cause of action. The ground of non-suit, it appears, was that the plaintiffs had been premature in beginning their first action, the statutory period mentioned in the extended form of covenant to insure not having expired.

The defendant contends that under the present rules and practice of the Courts, introduced by the Judicature Act, such judgment of non-suit is final, and is equivalent to a judgment upon the merits for the defendant, citing Rule 330 of the Judicature Act.

This contention involves the consideration of the very important question as to how far the rules and practice of the Superior Courts, as altered by the Judicature Acts, affect the practice heretofore observed in the Division Courts.

The only express provisions I find in the Judicature Act affecting Division Courts are sections 77, 78 and 80 of the Act, and Rule 489 of the Rules of Court in the schedule attached to the Act. For the purpose of this enquiry, however, we must look also at certain other rules and sections affecting the County Courts, with a view to discover the intention of the Legislature, and so form a conclusion as to how much, if any, of the practice laid down in the Act and Rules, can by implication be imported into the inferior Courts. Rule 490 extends the "pleadings, practice and procedure of the High Court of Justice to the County Courts wherever the present pleadings, practice and procedure of the County Courts correspond with those of the Superior Courts of law."

The Division Court is a Court created by Statute (4 & 5 Vict. cap. 53; 13 & 14 Vict. cap. 53; R. S. O. cap. 47; 43 Vict. cap. 8). It is not a Court of Record (R. S. O. cap. 47, sec. 7); but its judgments have the same force and effect as the judgments of Courts of Record. The Court, therefore, is simply the creature of the Statutes constituting it, and to these Statutes and the Rules subsequently enacted under powers granted by sections 237, 238, 239, 240 and 241 of the Revised Statute, and to any other enactments passed from time to time by the Legislature expressly made applicable in whole or in part to Division Courts, we must look to ascertain the practice and procedure which shall govern. There is this qualification, however, to the foregoing statement: sec. 244 of the D. C. Act enacts that "In any case not expressly provided for by this Act, or by existing rules, or by rules made under this Act, the County Judges may, in their discretion, adopt and apply the general principles of practice in the Superior Courts of Common Law to actions and proceedings in the Division Courts."

What this discretion may mean exactly, it is perhaps difficult to determine in any particular case, but where a County Judge attempted to exercise it, by making an order for the examination of a defendant, under sec. 24 of the A. J. Act of 1873, Chief Justice Wilson (then Mr. Justice

Wilson) granted a writ of prohibition, on the ground that the provisions for the examination of parties were *beyond* the jurisdiction of Division Courts, and on the ground that such a practice would unreasonably increase costs. The learned Judge further added, "That he would not sanction a practice being introduced into these Courts in which the Judge decides according to equity and good conscience, so unsuited to their constitution and purpose *without direct legislative authority*." *In re Willing v. Elliott*, 37 U. C. R. 320.

On the other hand, it was held by Mr. Justice Cameron, that it was a proper exercise of this discretion to make an order for security for costs in a Division Court case, where the plaintiff resided out of the jurisdiction, on the express ground, that, it being a matter of practice (not a rule of law) within the principal of practice in the Superior Courts, it was competent for a Division Court Judge to resort in his discretion to the practice in those courts. *Fletcher v. Noble*, 9 P.R. 256.

Section 77 of the Judicature Act enacts, that, "every County and Division Court shall as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant, in any proceeding before such Court, such relief, redress or remedy or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and like effect to every ground of defence, or counter claim equitable or legal, (subject to the provision next hereinafter contained) in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice."

This section I think refers only to the complete legal and equitable jurisdiction conferred upon all the Divisions composing the High Court of Justice and Court of Appeal, and more particularly set out in section 16 of the Act. It does not purport to deal with the practice; but it enacts, that, for the purpose of administering complete relief, redress or affording adequate remedy, the County Courts and Division Courts shall possess within their several jurisdictions the same legal and equitable powers as those possessed by the High Court of Justice. This was clearly a necessary provision in the case of the County Court, which had been deprived of its former equitable jurisdiction by the Law Reform Act, (32 Vict. cap. 6, sec. 4, O.). It might not perhaps be so necessary to enact it with reference to the Division Courts, which were already Courts of equity and good conscience (R. S. O. cap. 47, sec. 54, sub-sec. 2) but doubtless for the purpose of removing all doubts, the section was made to extend to all the inferior Courts of civil jurisdiction. It does not add to the machinery of the Division Courts, and therefore there will be many cases where in order to secure remedies or redress, which the Division Courts, from lack of territorial jurisdiction or adequate machinery are unable to extend to a suitor. The cause will have to be removed by *certiorari* to the Superior Courts; this is provided for by sec. 61 of D. C. Act, and sec. 78 of the Judicature Act will also meet the class of cases where the counter-claim or cross relief sought by a defendant exceed the powers or jurisdiction of the Division Courts.

Section 80 of the Judicature Act enacts, that, "the several rules of law enacted and declared by this Act shall be in force and receive effect in all

courts whatsoever in Ontario so far as the matters to which such rules relate, shall be respectively cognizable by such Courts."

This clearly in my opinion refers only to the rules of law laid down in sec. 17 of the Act.

What then is the effect of the Rules set out in the schedule to the Act? Sec. 53 defines very plainly their application "as to all matters to which they extend" they "shall thenceforth regulate the proceedings *in the High Court of Justice*."

This direct and positive limitation I think confines their application to that Court alone, except where a rule in express terms is made applicable to either the County Court or Division Court. In support of this view, see Rule 490, (already referred to) which extends the practice and procedure of the High Court of Justice with certain limitations to the County Court. Rule 264, which is directed in express terms to be construed as applying to County Courts; Rule 489, which confers jurisdiction upon County Court and Division Court Judges, to deal with the question of costs where the Court discovers that they have no original jurisdiction to deal with the subject matter of the suit; to Rule 486 abolishing County Court terms, notwithstanding the general language contained in sec. 18 of the Act, though it is true that such section is under the heading "High Court"; and to the other rules under the heading of "County Court" in the schedule.

The provisions of the D. C. Act on the subject of non-suit are as follows:— Sec. 81, after stating the mode of procedure at the trial of an action, goes on to say, "and in case satisfactory proof is not given to the Judge entitling either party to judgment, he may non-suit the plaintiff, and the plaintiff may before verdict in jury cases and before judgment pronounced in other cases insist on being non-suited." Rule 122 supplements an apparent omission in the statutory clause by giving the Judge power to non-suit injury cases even where the plaintiff does not request it.

At law, before the Judicature Act, a non-suit was regarded as a default only and not a judgment upon the merits. It was not conclusive of the plaintiff's rights, and he had the opportunity of bringing his action on again, either in another shape, or when better prepared with evidence, while if a verdict were once given, and judgment entered thereon, he was forever barred from suing the defendant upon the same ground of complaint (Archbold's Q.B. Practice, 12th Ed. 444). The only penalty a non-suit imposed upon him was the payment of the defendant's costs. It was not a rule of law, but a rule of practice.

This then was the meaning and effect of a nonsuit at the date of the passing of the D. C. Act. I do not think, in view of the sections of the Judicature Act to which I have called attention, that any of the Rules of Court in the schedule to the Judicature Act *ex vi termini* govern the practice in the Division Court, except such rules as contain express language making them applicable to that Court, e. g. Rule 489. Nearly all the procedure regulated by the Rules of Court is totally inapplicable to the Division Court; and many of them, if adopted, would effectually abrogate various sections of the D. C. Act and many of the Rules of that Court passed by virtue of the Act. I do not think that it should be held that various clauses of an

important Act of Parliament, dealing as it does with the construction and practice of an existing Court of law, should be considered repealed by anything short of express legislative language.

Having then expressed my view of the non-application of the Rules of Court contained in the schedule to the Judicature Act, unless they contain express language to that effect, I must now consider whether the effect of a nonsuit as it was understood before the passage of the Judicature Act is a case provided for by the D. C. Act itself or its rules, so as to render it unnecessary to exercise the discretion allowed by section 244 of the D. C. Act.

The D. C. Act must be regarded as speaking from the date of its enactment, and the language of its various sections must be construed, so far as the meaning to be attached to particular words is concerned by reference to the meaning those words had when the subject matter was being dealt with by the Legislature. If the word *nonsuit* had a well known signification—namely, that of a *default* only—which did not prejudice the plaintiff in commencing another action—it must undoubtedly be held that it was employed in that sense and with that meaning (unless qualified by express language), wherever it appears in the Act or Rules. It has heretofore had the effect attributed to it above set out by all the Judges who have presided over Division Courts, and has become a part of the existing practice of those Courts well known to both suitors and advocates. There has been no express legislative enactment varying that meaning, except the language contained in Rule 330 of the Judicature Act; and in my view that Rule is confined in its application to the High Court of Justice and the County Court. I do not therefore consider it a case unprovided for by the D. C. Act and Rules.

But should my view in this particular be erroneous, I would still consider it the exercising of an unwise discretion to introduce Rule 330 into Division Court practice under the power contained in section 244 of the D. C. Act. I cannot do better than to quote in support of this conclusion the language of the learned Judge of the County Court of the County of Victoria, in the case of *Conan v. McQuade* (19 L. J. N. S. 108)—a decision in which I thoroughly concur. It was an application under Rule 80 of the Judicature Act, to strike out a defence in an action in the Division Court, and for leave to sign judgment; and the right to follow this practice was urged as being practice that the Judge should allow under the discretion conferred upon him by section 244 D. C. Act. "Nothing can be clearer than this," says the learned Judge, "that where a Judge advances beyond legislation, or in any way carries the law or practice beyond its former boundaries, he must see to it that his extension cannot work injustice. Whatever there may be of inequity in the law as he finds it, is no concern of his; but it is his duty not to lay down any rule or make any precedent which he sees may, in cases which would be governed by such rule or precedent, work a wrong." And, again, at the conclusion of his judgment, he says, "How far this principle might wisely be applied to the extended jurisdiction, with proper provisions as to costs, is only for the Legislature to say; but until it chooses to make some change in the law I shall regard it as the exercise of a sound discretion to leave the matters as it has left them."

The Division Court is the "poor man's" Court. In the rural portions of a county, the parties are in a great number of cases their own counsel. They enter their claims themselves for suit, without consulting a solicitor, who if employed at all, is generally not consulted until the hearing. As a consequence of this system the suitor will frequently commence his action before his claim is ripe—or may fail to be prepared with sufficient evidence at the trial to establish his rights. To give a non-suit the effect of a judgment upon the merits would therefore in my opinion often work an injustice in a court of "equity and good conscience" and would introduce a practice unsuited to a forum, where the laity themselves, either as agents for others or in person, have the same footing by law as the trained and duly accredited Barrister or solicitor. The penalty of a non-suit in the Division Court is the payment of the defendant's costs, and I see no reason why a plaintiff in a Court, where there are no pleadings, and few technicalities, should not have the right to bring a fresh action where, either through his blundering or his ignorance of the rules of law he has failed to make out his case to the satisfaction of the Judge, and has in consequence thereof been non-suited. In view of these conclusions, I cannot give effect to the defendant's objection that the former non-suit is bar to this action.

(Reported by Allan Cassels, Esq., Barrister-at-law.)

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STRIKES AND STRIKERS IN THEIR LEGAL ASPECT.

SINCE the days when the labourers in the vineyard murmured because "they likewise received every man a penny," the sanction which breathes from the parable to the claim of the hirer of labour to do what he will with his own, so long as he fulfils legal contracts and does nothing unlawful, has been accepted as just, and as supporting a truth which has become an axiom both of political economy and of law. Yet the telegraph operators, who, at this writing, are obstructing for their own purposes a most important channel of business communication, and subjecting the citizens of this country and the United States to the inconvenience and loss entailed by a general strike, seem not to be of this opinion. "The companies are paying large dividends," say the strikers, "let them therefore pay us higher wages, or we will ruin their business."

It might not be difficult for the political economist, adverting to the history of strikes in general and their uniform result, to prove to these strikers (if they would hearken to him) that their concerted action in this instance is calculated to result in injury rather than in permanent benefit to their craft at large. The scope of this article, however, will be confined to a brief survey, from a legal point of view, of the relations in which the parties engaged in this struggle stand to each other.

Telegraph companies are common carriers of messages, and much of the law relating to common carriers applies to them; they are subject to all rules which are in their nature applicable to all classes of common carriers (a). In fulfilling their duties they must employ care and attention; and, as a learned writer remarks, the word "care," when referring to what is required of them, and when the important and delicate nature of their business is considered, necessarily means great care, such care as would not be exacted of ordinary carriers of merchandise (b). They are held responsible not only to the sender of a message, the only person with whom they directly contract, but also, in many cases, to the receiver (c). In England and in many of the States of the American Union they are held liable for the default of other companies whom they employ to transmit their messages, and whose action in such transmission they are unable to oversee and, to a great extent, powerless to control (d). They are public servants, and can neither refuse messages properly tendered them for transmission nor give preference to one customer's business over that of another. They must send forward messages in the order in which they receive them, and in Ontario this duty is made obligatory by statute under a penalty for its infraction (e). They must employ competent operatives, and they are responsible for delays as well as mistakes of transmission (f). Even their assumed power to limit their

(a) Shearman and Redfield on Negligence, 554; but see *Breeze v. U. S. Telegraph Co.*, 45 Barbour, 274; *Baxter v. Dominion Tel. Co.*, 37 U. C. R. 482.

(b) Shearman and Red. Neg. 557.

(c) *Ross v. United States Telegraph Co.*, 3 Abbott's Pract. Rep., N. S. 408; *Playford v. U. K. Tel. Co.*, L. R. 4 Q. B. 706; *Lane v. Cotton*, 12 Mod. 488.

(d) *De Rutte v. New York, Albany and Buffalo Magnetic Tel. Co.*, 1 Daly 547.

(e) *Davis v. Western Union Tel. Co.*, 1 Cincinnati Supreme Court Rep. 100; R. S. O. cap. 151, sec. 3.

(f) *Landsberger v. Magnetic Tel. Co.*, 32 Barbour 530; *Stevenson v. Montreal Tel. Co.*, 16 U. C. R. 530; *Kinghorne v. Montreal Tel. Co.*, 18 U. C. R. 60; *Birney v. New York and Washington Printing Tel. Co.*, 18 Maryland. 341; *Western Union Tel. Co. v. Ward*, 23 Indiana 377; *Bryant v. American Tel. Co.*, 1 Daly 575; *United States Tel. Co. v. Wenger*, 55 Penn. St. 262; *Squire v. Western Union Tel. Co.*, 98 Mass. 232; *True v. The International Tel. Co.*, 60 Me. 9.

liability to senders of messages by special written stipulations has, in the absence of statute, been doubted, and such stipulations have been held valid only so far as the Court trying the issue may adjudge them reasonable (*g*). The charters of telegraph companies usually limit them also as to the rates they shall charge. The responsibility which the companies rest under to forward messages with promptness and accuracy is very heavy, and apparently trivial mistakes or unimportant delays may result to them in large verdicts for damages.

It is thus apparent how great is the danger to which a wide-spread and unexpected strike of their employees may expose them. In the trial of actions against them for damages, the merits of any misunderstanding which may have arisen between them and their servants form no part of the inquiry; the companies are strictly held to their duty to the public to be at all times prepared to receive and transmit messages with ordinary promptness and accuracy, and their failure so to do, from whatever cause arising, is at their own risk.

Such is the legal position of the companies. Let us now turn to that of the strikers, as members of a trade union and as individuals.

Trade unions are at the present day recognized by the statute law. In former times, at the common law, to form combinations of workmen for the purpose of restricting and controlling the free disposal of labour, and for supporting strikes, was held illegal, because operating in restraint of trade (*h*). "Such combinations," says Hannen, J., "cannot create any mutual obligation, having the legal effect of binding each other not to work and not to employ unless upon terms fixed by the combination" (*i*). The common law shewed no partiality towards one class or another, and recognized no class, equally discountenancing improper contracts whether made between masters (*j*) or workmen.

(*g*) *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Wolf v. Western Union Tel. Co.*, Allen's Tel. Cas. 463.

(*h*) *Leake*, 741.

(*i*) *Farrer v. Close*, L. R. 4 Q. B. 612.

(*j*) *Hilton v. Eckersley*, 6 El. & B. 66.

While, in later times, statutes have been passed in reference to these subjects, yet these statutes will be found to be, to a great extent, simply declaratory of rights which were in existence prior to their adoption, the chief benefit of the statutes being to introduce more summary remedies. Thus, interfering with, threatening or molesting workmen, always gave their employer a right of action against the offending party (*k*). So, enticing away and procuring workmen to desert gave such a right; and it is instructive to note that the measure of damages in these cases was not confined to the loss of service, but that the jury were held to be justified in giving ample compensation for all damages resulting from the wrongful act (*l*).

The Courts have also interfered by injunction; and in one case of intimidation by a trade union, this remedy was granted to restrain the posting of placards enjoining workmen not to work for the plaintiffs, upon the ground that the action of the defendants tended to the destruction and deterioration of the plaintiffs' property (*m*). The Court here interfered in a civil case, although the act complained of was a statutory crime.

It was held in another case that an indictment for conspiracy would lie at common law against the servants of a company, under contract of service, who, being offended by the dismissal of a fellow-servant, agreed together to quit the service of their employer without notice, and in breach of their contracts of service, by reason of which the company were seriously impeded in the conduct of their business (*n*).

In regard to the statutes relating to this branch of law, it is unnecessary to refer to any earlier than the Trade Union Act, 1872 (*o*), which followed the British Trade Union Act, 1871. It would appear that this Act was passed to secure

(*k*) *Garrett v. Taylor*, Cro. Jac. 567.

(*l*) *Hewitt v. Ontario Copper Lightning Rod Co.*, 44 U. C. R. 28; *Lumley v. Gye*, 2 El. & B. 216; *Gunter v. Astor*, 4 Moore, 12.

(*m*) *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551.

(*n*) *Regina v. Bunn*, 12 Cox C. C. 316. See also *Walsby v. McAuley*, 3 E. & E. 516.

(*o*) 35 Vict. cap. 30 (D).

two objects : first, to exempt the members of a trade union from liability to criminal prosecution for conspiracy which they otherwise might incur at common law, where it could be held that the purposes of the union were in restraint of trade and hence unlawful ; and to declare not unlawful agreements or trusts between members of trade unions which would be void or voidable at common law for similar reasons ; and, secondly, to permit the registration of trade unions the purposes of which are not unlawful, to give power to their trustees to hold the property of the association, bring and defend actions, etc., to fix the responsibility of such trustees, and to provide a summary means of punishing officers or members for withholding or embezzling moneys or property of the union. To accomplish these objects a statute was necessary, as the common law doctrine as to restraint of trade, though deemed no longer useful or expedient as applying to certain combinations of workmen, was still in force, and required to be partially abrogated ; and moreover, difficulty was experienced before the statute in proceeding by indictment or for trespass against defaulting officers, who were generally part-owners as well as trustees, and who hence could not, in many cases, be held liable, save in damages, for the abstraction of property in their hands as such.

The twenty-second section of the Act defines the term "trade union" to mean, "such combination, whether temporary or permanent, for regulating the relations between workmen and masters, or for imposing restrictive conditions on the conduct of any trade or business, as would, if this Act had not been passed, have been deemed to be an unlawful combination by reason of some one or more of its purposes being in restraint of trade."

The criminal statute now in force (*p*) relating to violence, threats and molestation contains the following provisions :—

1. Every person who wrongfully and without legal authority, with a view to compel any other person to abstain from doing anything which he has a legal right to do, or to do anything from which he has a legal right to abstain—

(*p*) 39 Vict. cap. 37 amending 35 Vict. cap. 31.

(i). Uses violence to such other person, or his wife or children, or injures his property ; or—

(ii). Intimidates such other person, or his wife or children by threats of using violence to him, her or any of them, or of injuring his property ; or—

(iii). Persistently follows such other person about from place to place ; or—

(iv). Hides any tools, clothes or other property owned or used by such other person, or deprives him, or hinders him in the use thereof ; or—

(v). Follows such other person with one or more other persons in a disorderly manner in or through any street or road ; or—

(vi). Besets or watches the house or other place where such other person resides or works or carries on business or happens to be—

Shall be liable to a fine not exceeding one hundred dollars, or to imprisonment for a term not exceeding three months;

Attending at or near or approaching to such house or other place as aforesaid, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section.

4. A prosecution shall not be maintainable against a person for conspiracy to do any act, or to cause any act to be done for the purposes of a trade combination, unless such act is an offence indictable by statute or is punishable under the provisions of the Act hereby amended; nor shall any person, who is convicted upon any such prosecution, be liable to any greater punishment than is provided by such statute or by the said Act as hereby amended, for the act of which he may have been convicted as aforesaid.

Malicious injury to wires, batteries etc., and malicious obstruction of the working of the telegraph in Canada, is made a misdemeanor punishable by imprisonment in any gaol for any term less than two years, with or without hard labour. (q)

Any person guilty of a wilful omission or neglect of duty which endangers the safety of any railway passenger, or guilty of assisting therein, is liable to like punishment. Railway operators might be affected by this provision (r).

To whichever of the participants in the present struggle between the telegraph companies and their operators the sympathies of the public may be extended, or whatever advantage may be gained by one party or the other, it can hardly be doubted that competition alone, must, in the end, be permitted to regulate the amount of compensation due the skill and labour of telegraph operators as of all other wage-workers. The strikers must thus necessarily—and in no spirit of antagonism to the often poorly paid operatives be it said—fail to obtain any enduring fruit of the struggle and privation they have borne with so much cheerfulness and, withal, moderation. To annul permanently the effect of an economic law as infallible in its operation as any physical law, may well be deemed a hopeless undertaking.

WM. SETON GORDON.

(r) 32-33 Vict. cap. 20, sec. 33.

HIGH COURT PRACTICE IN INFERIOR COURTS.

We printed in our last number two cases upon this subject, in which different results are arrived at (a).

Mr. Justice Armour, in the former case, held that the Division Court Judges might exercise their discretion in applying High Court practice to their Division Courts, refusing a writ of prohibition to prevent the exercise of such discretion, while Judge McDougall, in the latter case, refused to exercise his discretion, and in so doing gave reasons for his decision, which leave it open to great doubt whether it is advisable that the discretion should be exercised at all. The subject is of importance to a vast number of suitors and, we believe, formed the subject of discussion at the meeting of the County Court Judges not long ago.

Judicial opinion upon the matter has varied greatly, and neither in England nor in Ontario is there a *consensus* of opinion. The subject presents itself in two aspects, viz.: 1st, as affected by the Judicature Act and Rules; and, 2nd, as affected by the Division Courts Act, section 244.

The Judicature Act, sec. 77, declares that "Every Division Court shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant in any proceeding before such Court, such relief, redress or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counter claim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice." Provision is made by section 78 for cases in which the defendant's claim is beyond the jurisdiction of the Court.

(a) *Macnee v. Ontario Bank and Building & Loan Association v. Heimrod*, ante pp. 360, 361.

By section 244 of the Division Courts Act, "In any case not expressly provided for by this Act or by existing rules, or by rules made under this Act, the County Judges may, in their discretion, adopt and apply the general principles of practice in the Superior Courts of Common Law to actions and proceedings in the Division Courts."

And first, with respect to the provisions of the Judicature Act.

In *Ex parte Martin* (b), the construction of the section of the English Act corresponding to the section above quoted came into question. In an action of *Martin v. Bannister*, judgment for an injunction against the defendants was awarded, and upon the learned Judge of the County Court refusing to commit the defendants for breach of the injunction, on the ground that he had no jurisdiction, the matter came before the High Court. The Court, consisting of Kelly, C.B., and Pollock, B., were of opinion that the section gave to the County Court the power to enforce obedience to the injunction because it had the power to grant the injunction. Upon appeal this judgment was affirmed by Lords Justices Bramwell, Brett, and Cotton. The part of the judgment of the Court of Appeal, which is material to the present enquiry is to be found in the judgment of Cotton, L.J., where he is reported to have said, "The power is given by sec. 89, and must be exercised in the manner and form pointed out by the County Court rules (c).

In *Richards v. Cullerne* (d), a motion was made to the County Court to commit the plaintiff for disobedience of an interlocutory order, and was refused, but on appeal this order was reversed. The Court held that there was no real distinction between the enforcing of a final judgment, as in *Ex parte Martin*, and this case. Jessel, M.R., said that the words "any proceeding" in section 89 (our section 77) were applicable to any stage of an action. Brett, L.J., said, "The County Court then has the same power as the High Court at every stage."

(b) L. R. 4 Q. B. D. 212.

(c) *Ibid.* 493.

(d) L. R. 7 Q. B. D. 623.

But it was not till *Pryor v. The City Offices Company* (e), came up for decision that the full signification of the section—the full meaning of “the same powers as the High Court”—was precisely ascertained. In that case, which was a case in the Mayor’s Court, there was a verdict for the defendant in an action of trespass to goods and trover. Upon the return of a rule *nisi* for a new trial, the Recorder, instead of making it absolute, entered judgment for the plaintiff under Order XL., Rule 10, of the Judicature Act (our rule 321), being of opinion that section 89 (our section 77) of the Act authorized him to apply the rule. The English section and rule are identical with ours, and the remarks of the Lords Justices, when the case came before them on appeal, are so apposite that we may be pardoned for citing somewhat at length from the judgments. Brett, M.R., said, “The first point, as it seems to me, to be considered is, what is that which is enunciated by Rule 10, Order XL. (f). It is a power, and nothing but a power, given to a Judge of the Superior Court under certain circumstances to give the relief or remedy which otherwise would be given by another procedure. Now, if that be so, the question is whether that power is given to a Judge of an inferior Court by section 89 of the Judicature Act of 1873. [The words are then quoted.] What does that enable the inferior court to do? It enables it to grant the same relief, redress or remedy as in the like case the High Court of Justice should grant. It can do so ‘in any proceeding.’ Now, what is the meaning there of ‘in any proceeding?’”

It is argued that it means in any step in any proceeding which is brought before such Court. But, as has been pointed out by my brother Cotton, the word “proceeding” is used in sec. 90, and one naturally looks there to see whether in that, which is a corresponding section, dealing with a similar subject-matter, one can gather any assistance as to the true meaning of the word ‘proceeding’ in sec. 89. Now, although if sec. 89 stood by itself, there

(e) L. R. 10 Q. B. D. 504.

(f) Our Rule 321.

might be some difficulty in determining what is the meaning of the word 'proceeding,' yet it seems to me to be clear what is its meaning in sec. 90, and that 'proceeding' in that section is a general word meant to cover every step in an action, and is equivalent to the word 'action.'

Then section 89, being a section *in pari materia*, it seems (according to the ordinary canon of construction) that 'proceeding' in that section means the same as it does in section 90, and therefore the words 'in any proceeding' must be read as 'in any action.' They do not mean in any step in the action, but in the action itself. * * It gives to the inferior Court authority to grant the same relief, redress, or remedy as the result of the action; but it does not give such Court the same power as the Judges of the Superior Court have to arrive at the granting of such relief, redress or remedy, and therefore it does not give the inferior Court the power which is given by Rule 10 of Order XL., and consequently the judgment of the Recorder cannot be supported."

Cotton, L.J., says, "Then the 89th section of the Judicature Act, 1873, merely says that such relief, redress or remedy shall be given as might be given by the High Court; but it does not say that it shall be given by the same proceedings or in the same way as it is done by the High Court." And Bowen, L.J., says, "that the confusion is in supposing the relief is the same thing as the mode of getting it. I think the Mayor's Court has ample power to do justice, but it must do justice in its own way, and with its own machinery."

It is worthy of remark, *en passant*, that the concluding remark is almost identical with Lord Justice Cotton's expression of opinion in *Ex parte Martin*. And the sum and substance of the case is that the inferior Court, in any matter before it, whether it be called by the name of action, suit, or by any other name (all of which are included in the term "proceeding"), may grant the same relief as the High Court could grant if the matter were before it, but must utilize its own machinery for the purpose, and cannot

borrow from the High Court practice either in substitution or in aid of its own practice.

The view of the Court of Appeal was probably that taken by the draughtsman of our Judicature Act—where he was not a copyist. For by Rule 490, “the pleadings, practice and procedure for the time being of the High Court of Justice shall apply and extend to the County Courts, wherever the present pleadings, practice and procedure of the County Courts correspond with those of the Superior Courts of Law.” Here is a direct but qualified application of the High Court Practice to County Courts. But for this Rule it seems that such practice would not have applied to the County Courts; and, in the absence of any such express mention of the Division Courts, we must conclude that, though it is within their power to give any redress which the High Court might give, the means which the High Court employs for its purposes have been withheld from them.

Secondly, we come to the consideration of the provisions of the Division Courts Act, section 244, above quoted. And be it remarked that the power thereby granted is one to be invoked in aid and not in substitution of the domestic practice of the Division Courts.

In *Re Willing v. Elliott (g)*, Wilson, J., held that it was beyond the jurisdiction of the Division Court Judges to compel the examination of a defendant before trial pursuant to the terms of the Administration of Justice Act. The reasons given are that the proceedings cannot be carried out by the machinery of the Division Court; that nice points of evidence were not intended to be raised in these Courts, such as might be raised in these proceedings in the Superior Courts; that the expense to suitors might be increased (*h*). In *Cowan v. McQuade (i)*, this case was

(*g*) 37 U. C. R. 320.

(*h*) The wisdom of this reason, and of Judge Dean's remarks to the like effect in *Cowan v. McQuade*, *infra*, was never more apparent than in *Macnee v. Ontario Bank*, *supra*, in which case the costs amounted to over one hundred dollars, while the claim did not exceed five. One of the solicitors engaged in the case is our authority for this.

(*i*) 19 C. L. J. 108.

followed. In *Burk v. Brittain* (j), Judge Clarke felt himself bound in justice to the plaintiff, whose claim was a valid one, to give judgment before trial, applying the principle obtaining in the High Court by virtue of its rules. In *Macnee v. Ontario Bank*, as we have seen, Mr. Justice Armour refused to interfere with the Division Court Judge's exercise of discretion in applying High Court practice, while in *Heimrod's Case* Judge McDougall refused to apply such practice. We have therefore an equal numerical force of the judiciary on opposite sides of the question, viz., one Superior Court Judge and two Division Court Judges for, and the same number against, the introduction of High Court practice into Division Courts. We include Judge Toms, who made the order for examination of the defendant in *Willing v. Elliott*.

The wording of the section under review is somewhat peculiar. It is not the practice itself of the Superior Courts, but the general principles of the practice, that the Division Court Judges are at liberty to apply. What the exact distinction is may be difficult to say. Practice is the means whereby principles are carried into operation. If the Division Courts are not at liberty to apply the practice, but the general principles only, then the clause is tantamount to saying that the practice of the Division Courts may be used at discretion for giving effect to the principles which the Superior Court practice brings into operation, wherever those principles are not expressly provided for in the Division Courts Act and Rules. This effectually excludes Superior Court practice from the Division Courts. For if the principles of the Superior Court are also present in the Division Courts practice, it is needless to resort to the Superior Court for them. If they are not present there they may be introduced only to the extent to which the domestic practice of those Courts permits of it; and this was present in the mind of Mr. Justice Wilson when he refused to allow a principle of Superior Court practice to be introduced, because the domestic practice was so imperfectly constituted that it could not be fully carried out.

But how can a principle of practice be applied? A view of *Willing v. Elliott*, not taken in that case, may illustrate it. If the defendant had refused to obey the order of the learned Judge to attend for examination, could the learned Judge have committed him for contempt? That depends, it may be argued, upon whether he had power to make the order. For if the principles of the practice can be applied, the means of enforcing or carrying them out must also be imported with them, on the reasoning of *Ex parte Martin*.

To this it may be answered that the want of power to enforce an order may be a very safe indication of the want of power to make it. And again it may be said, that such a construction of this clause would leave it in the discretion of the Division Court Judges to introduce the whole Superior Court practice for the carrying out of Superior Court principles of practice, to supplement the defective machinery of the Inferior Courts. It manifestly was not intended to limit and bound the Division Court Judges by statutory restrictions as to their own practice, and leave them the unlimited discretion of ranging over the whole Superior Court practice, for the purpose of introducing, at their will, such parts of it as were not already inherent in their domestic practice, though in a different form.

Again, the power to commit in the Division Courts is a very limited one, and the cases in which a Judge may commit for contempt are specifically set out (*k*). And this raises the question whether any principle of practice, which requires for its enforcement the committal of a party for disobedience, can be introduced into the Division Courts, the power to commit in these Courts being "especially provided for" by the Division Courts Act within the meaning of sec. 244. The decision in *Richards v. Cullerne* (*supra*), would have gone far towards establishing the right to commit under such circumstances, had not *Pryor's Case* settled the meaning of "proceeding" in the clause of the Act there in question; but it must upon that point at any rate be considered as superseded by the latter case. If

(*k*) Division Courts Act, sec. 217; and see secs. 182 *et seq.*

Richards v. Cullerne is right *Pryor's Case* is wrong, and the Recorder was right in giving judgment at the stage of the case at which he did. *Pryor's Case* being the later decision will no doubt be followed.

The same argument, which we have used respecting the examination of parties may be used with respect to other provisions of the Division Courts Act. And so the case of *Building & Loan Association v. Heimrod* may be supported almost entirely on the ground that non-suits are expressly provided for by section 81 of the Division Courts Act, and therefore the Judges are not at liberty to give effect to the principle of the Judicature rules that a non-suit is to be deemed a judgment on the merits unless otherwise directed.

The section under review must mean something, however, and we are not prepared, therefore, to agree with Mr. Justice Wilson's remark that it is beyond the jurisdiction of the Division Court Judges to apply the principles of High Court practice. Still, the power so granted to them is reduced to an infinitesimal quantity if those Courts are to serve the purposes for which they were created. If every Judge were at liberty to introduce such parts of the High Court practice as he might see fit at the moment, the Courts would become, as Judge Dean says, little short of a public nuisance.

EDITORIAL REVIEW.

The Salvation Army.

We notice that the Police Magistrate of London, Ontario, has fined several members of the Salvation Army for beating drums and otherwise causing a disturbance on the public streets.

Why this peculiar Society should be singled out for punishment for beating the loud cymbals it is difficult to say, unless for the reason given by the East Indian magistrate in a certain play, "—— it, sir, we must discriminate," or else *pour encourager les autres*. Orangeism, Catholicism, Sunday-School picnic-ism, negro minstrelsy, all develop some kind of noisy public demonstration at the several periods of the year when they respectively become ripe for noise. But they all unmolested blow upon brass instruments and beat upon drums to the inconvenience and danger of foot passengers and the drivers of vehicles. It would be called persecution in the case of any recognized religious sect if its members were fined or imprisoned for their peculiar method of worshipping, or disseminating the Gospel.

Considering the terms of our Statute, C. S. C. cap. 74, which enacts that, "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, so as the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the Province, is by the constitution and laws of this Province allowed to all Her Majesty's subjects within the same," considering, we say, the terms of this enactment, we think the Salvation Army have a right to complain that they are not being treated fairly. If the Police Magistrate aforesaid considers the beating of drums an "act of licentiousness," we should like to hear

the process by which he distinguishes between the trumpets and shawms, the psaltery and harp, the timbrel and the loud cymbals of the Psalmist, on the one hand, and the cornets and kettledrums of the Salvation Army on the other. We cannot believe that the civic authorities really believe that the practices of the Salvation Army are "inconsistent with the peace and safety of the Province," when they deliberately allow the insufferable nuisance of parades by minstrel bands and circus performers in the public streets.

Men in all ages have adopted some outward and visible sign of their inward and spiritual convictions. While some have made broad their phylacteries and enlarged the borders of their garments, others are content with pinning blue ribbons on their coats, while a third party make themselves joyous together with drums. The last suffer imprisonment, while the others are simply seen of men.

The Mercer Escheat Case.

The news comes that their Lordships of the Privy Council have, after long argument and short deliberation, reversed the decision of the Supreme Court of Canada in *Attorney-General v. O'Reilly*, better-known as the *Mercer Escheat case*.

After the Privy Council has pronounced upon a case, it is politic as well as safe to adopt and approve of the decision, and so, while we are quite conscious of our liability to the accusation of being wise after the event, we propose to make a remark or two upon the case.

The constitutional history of Canada was ransacked for everything that had any bearing on the subject of Crown revenues, dues, royalties and so forth, resulting in the production of a vast amount of interesting lore which had, we venture to say, little bearing upon the case.

The meaning of Escheat is well defined in the books, and no difficulty could have arisen but for the divided legislative jurisdiction in Canada. What the grounds of decision are in the Privy Council we are unable as yet to say, the particulars not having reached Canada at the time of writing. But we venture to think that the difficulty of the whole

case turns more upon the theoretical, than upon the practical, branch of it. Upon failure of heirs all admit that the lands become *feodum apertum*, and, there being no tenant, the Crown takes possession—the lands become (to use our significant phrase) Crown lands, or, as the British North America Act has it, Public lands. To say that upon failure of heirs the lands revert to the Crown, is merely to predicate of escheat a general proposition which does not assist in solving the problem. It is a matter of purely theoretical interest in this case whether or not the Governor-General or the Lieutenant-Governor of the Province represents the Crown; for it appears to us that that question may be laid aside in dealing with the law of escheat. It is enough to allege that the property in the soil was before the grant, and therefore after its termination is, in the Crown. The question is who under our constitution has the sale and management of Crown or public lands? Number 5 of section 92 of the British North America Act declares that “The management and sale of the public lands belonging to the Province and of the timber and wood thereon,” are the subject of exclusive Provincial jurisdiction. It has never been asserted that the Provincial timber dues and the proceeds of sales of Crown lands (theretofore unpatented) and timber limits should go to the Dominion—the management and sale in the clause above quoted having always been considered to be a beneficial management and sale. Any other construction would render the Provinces merely agents, so to speak, for the management and sale of lands, subject to account to the Dominion for every transaction, and therefore subject to the direction of the Dominion in such sale and management. If the interpretation which accords to the Provinces the management and sale of Crown lands for their own benefit be the correct one, then it is necessary to show a distinction between escheated lands and ungranted Crown lands, in order to establish the right of the Dominion to the revenues or proceeds of sale of escheated lands. This we believe cannot be done. Great confusion is the result of introducing the question of the prerogative rights of the Crown. Escheat is not a prerogative right at all, but is

an accidental profit to the lord of the fee from the failure of heirs to inherit the subject matter of the grant. If there were a mesne lord in Canada between the Sovereign and the tenant in fee, the land would escheat to him and not to the Sovereign, and no question of prerogative could then arise. The Crown, in the case of a failure of heirs, has nothing to do with escheated lands except as being lord of the fee, and therefore does not take by prerogative right at all. Now, escheated lands in the hands of a mesne lord must be in the same condition as lands still ungranted by him. They are his property, and he may deal with them as he sees fit. Regarding the Sovereign as lord paramount then, escheated lands are no different from ungranted lands, and that being so, there is no reason for disputing the right of the Province to manage or sell them for its own benefit, as it manages or sells ungranted Crown lands.

But even if it be insisted that, because the lord paramount is the Sovereign, and because the Sovereign has the right to exercise her prerogative, therefore the person representing the Sovereign in Canada should deal with escheated lands, the answer is this, that there is sufficient indication in the British North America Act, that the Sovereign has abandoned her right to exercise her prerogative with respect to Crown lands in Canada, by assigning to the Provincial Legislatures the right to make laws respecting the sale and management of public lands belonging to the Province, by which we suppose is meant lands within the limits of the Province, and not specially devoted to the purposes of the Dominion.

Conflict of Marriage Laws.

The *Law Journal*, in commenting upon a letter of Mr. Bright's in which he says that a man may have a legal wife in a British Colony and another in England, says, "If a Canadian, married to a deceased wife's sister in Canada, were to come to England, his wife would not cease to be his legal wife, and his children born here would be legiti-

mate. In fact, the legality of a man's marriage does not depend on the place where he happens to be, or the legitimacy of his children on the place where they are born. It depends on his domicile at the time of his marriage. A man is not married and unmarried as he crosses a frontier."

The particular proposition is true, but the general proposition must be qualified. According to the law of England a man cannot lawfully have two wives, but by the conflicting laws of two countries a man may apparently have a lawful wife in each country. See a remarkably able judgment in *Roth v. Ehman*, Chic. Leg. News, 9th July, 1881, at p. 354. And see also *Magurn v. Magurn*, ante p. 352. In the latter case the defendant in an alimony action performed the very feat which is said by the *Law Journal* to be impossible, for by crossing, or rather re-crossing, the frontier and coming into Canada he was held to be legally married to a wife against whom he held a decree of divorce valid according to the law of Missouri, while in Missouri we must presume that the decree of divorce would be a good defence to a charge of bigamy, and that his second wife is therefore the lawful one in that State.

The *Albany Law Journal* makes the following remarks upon the passage which we have quoted from the *Law Journal*:—"And yet the House of Lords held, in *Brook v. Brook*, where an Englishman met and married his deceased wife's sister in Denmark, that the marriage although not forbidden in Denmark was invalid in England, and so, although Mr. Bright's statement was too broad, yet it would have been correct if he imagined a Londoner marrying his deceased wife's sister in Canada. That makes a case about as bad for the consistency of British laws." We cannot see any inconsistency in the law of England. *Brook v. Brook*, as we recollect the case, was decided on the ground that the Englishman had never abandoned his domicile. If he had been domiciled in Denmark his marriage there with his wife's sister would have been legal. It was the fact that he was an Englishman and not a Dane that turned

the case. So a Londoner coming to Canada, for any purpose other than that of acquiring a domicile here, and, whilst here, marrying within the degrees allowed by the law of Canada but contrary to English law, would return to England illegally married. If, however, he should come with the express intention of making Canada his domicile, his marriage according to Canadian laws would be good everywhere. So in *Magurn v. Magurn (supra)*, the question of domicile was the turning point in the case. The inconsistency is not in the law of any particular State, but is due to the conflict of laws of foreign States with those of England.

Lord Coleridge's Visit.

Committees have been struck for the purpose of making arrangements to entertain the Lord Chief Justice on 12th September next at a Bar dinner, and a good deal of work has so far been done. Gentlemen of the Profession will please bear in mind the following facts:—The dinner is not given by the Law Society, but by the Bar at large, and therefore the expense will be borne by subscribers to the fund. The Benchers, however, will contribute on behalf of the Law Society.

A large number of subscriptions have been already obtained. The Hall will hold a limited number, and it will therefore be absolutely necessary to close the subscription list at an early day. Gentlemen who forward their names at a late day must not be surprised to learn that they will be made the subject of special deliberation, as the cards of admission will be issued in the order of the names on the subscription list if the whole number is too large.

Invitations by subscribers will not be permitted. The Invitation Committee will issue all invitations.

The Honorary Secretaries have sent to each county town a formal document for signature by members of the Bar, for the convenience of gentlemen who wish to subscribe. They may, however, send their names direct to either of the Honorary Secretaries.

The General Committee will endeavour to fix the amount of the subscription at as early a day as possible. It will, however, be impossible, to do this until they can approximate the number of subscribers. An early return of names is therefore requested.

Silk Attire.

The Governor-General has been pleased to accord the privilege of wearing silk to the following gentlemen:—In Ontario—Valentine Mackenzie, Richard Bayley, Salter J. Vankoughnet, James Tilt, W. P. R. Street, G. M. Macdonnell, John Bain, F. D. Barwick, H. M. Wilson, R. C. Smyth, J. J. Foy, W. G. P. Cassells, N. F. Paterson, T. H. McGuire, Henry J. Scott. In Quebec—W. W. Robertson, William White, H. C. Cabana, George O. Doak.

Acts, ii. 12.

BOOK REVIEW.

Principles of Conveyancing. An elementary work for the use of students. By HENRY C. DEANE, of Lincoln's Inn, Barrister-at-law. Second edition. London: Stevens & Haynes. 1883.

Deane's conveyancing is divided into two parts. Part I consists of a treatise on corporeal hereditaments; Part II, a treatise on conveyancing. Although the learned author does not so express himself, he proceeds upon the principle that instruction in the principles of conveyancing is not imparted by placing before students a collection of precedents; hence the book is not stuffed with forms. A great deal of useful reading on real property law is to be found in the first part, while the second part affords an excellent grounding and preparation for the weightier works on conveyancing. We can say without flattery, that we should like to see it supplant some books of less merit that are selected for Educational purposes.

BOOK RECEIVED.

The Law and Practice of Discovery in the Supreme Court of Justice, with an appendix of forms, orders, etc. By CLARENCE JOHN PEILE, of the Inner Temple, Barrister-at-Law. London: Stevens & Haynes, 1883.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 30TH JUNE, 1883.]

ONTARIO INDUSTRIAL L. & I. CO. v. LINDSEY.

*Registering instrument not authorized by Registry Act—Cloud on title—
Action for wrong—Damages—Parties—Notice of action to Registrar.*

S., believing that his father (still living but of unsound mind) was entitled to certain lands, took the advice of his solicitor C., who was advised by counsel, and following his advice instructed C. to prepare and register an instrument whereby he, S., stated that he claimed the lands, and would, upon the demise of his father, commence proceedings for their recovery. This being done the plaintiffs were obstructed in the sale of their lands, and brought an action against S., C., and the Registrar, to remove the instrument from the title as being a cloud thereon, and for damages. Proudfoot, J., dismissed the action as against the Registrar, but awarded judgment with a reference to assess damages against S. and C.

Held, that the Registry Act did not contemplate the registration of such an instrument, and, Cameron, J., dissenting, that an action would lie for its removal.

Per Hagarty, C.J., and Armour, J. The act of registration was a wrongful one, and all parties combining in it are therefore responsible to the plaintiff, and the Registrar was therefore a proper party.

Per Hagarty, C. J. There being no *mala fides* the damages should be nominal.

Per Cameron, J. The instrument being void on its face as wrongfully registered, resort to a court is unnecessary and the action should be dismissed. The Registrar was not a proper party, having acted in good faith and within the scope of his duty; nor was C., the solicitor, a proper party, he having acted to the best of his judgment and ability in advising his client after consulting counsel.

Per Armour, J. No notice of action to the Registrar was necessary.

WILEY v. STANDARD INSURANCE CO.

Fire insurance—Encumbrances—Misrepresentation—Divisible condition.

A fire policy contained a condition, in addition to the statutable conditions, to the effect that if the property were alienated, or any transfer or change of title occurred, or if it were encumbered by mortgage, without the consent of the Company, or if the property should be levied upon, under process of law, the policy should cease. In answer to the question whether the property was mortgaged, the assured answered \$5,000 to the F. L. & S. Co. There were, at the time, in fact two mortgages to that company. After the policy a mortgage was given to secure endorsements and was discharged, and another was given by the plaintiff to his partner who retired from the firm, but the company was not apprised of either. The jury found that the representation as to incumbrances was false, and a verdict was entered for the defendants.

Held, that the representation as to incumbrances was a violation of the condition and that the verdict was right.

Per Hagarty, C.J. Though that part of the condition as to levying might be unreasonable (5 App. R. 605) the remainder is not, and the condition is divisible.

SKELTON v. THOMPSON.

Discharging water from building upon street—Formation of ice thereon—Negligence—Liability of proprietor.

The defendants were the owners of a building erected on the limit of the street. A pipe connected with the eave-troughs, conducted the water which collected on the roof down the side of the building, and, by means of a spout projecting over the sidewalk, discharged it upon the sidewalk; and in the winter this water was formed into a ridge of ice, upon which the female plaintiff slipped and fell while walking on the street, and injured herself. The jury found that the defendants did not know of the accumulation of ice, and that they ought not reasonably to have known of it.

Held, Armour, J. dissenting that the defendants were not liable.

Per Hagarty, C.J. The carrying of the water to the sidewalk was a harmless act; the action of the weather was the proximate cause of the accident, and the defendants not having knowingly allowed ice to accumulate are not responsible.

Per Armour, J. The conducting of the water to the sidewalk was a wrongful act, and the formation of ice on the sidewalk in winter was the natural, certain, and well-known result of the defendants' act, and they were responsible for the accident.

Bigelow, for the plaintiff.

Tilt, for the defendants.

REGINA *ex rel.* BRINE v. BOOTH.

Municipal Councillor—Liquor License—Partnership—Disqualification.

The defendant and his brother were carrying on business as Booth Bros., and had a license in the name of the firm to sell intoxicating liquors. Before the nomination for members of the Parkdale Council the defendant, with the consent of the License Commissioners, transferred his interest in the license to his brother in order to qualify as a Councillor; but the business continued as before.

Held, affirming the decision of the Master in Chambers, that a license cannot lawfully be transferred, except in the cases mentioned in R. S. O. cap. 181, sec. 28, none of which had occurred here; that the consent of the Commissioners did not validate the transfer, and therefore that the defendant, who retained his interest in the license, was not qualified to be a councillor.

Per Armour, J. The Act disqualifying a licensee should be construed strictly, and its effect should not be extended to the partner of a person lawfully holding a license in his own name.

Shepley, for the appeal.

Aylesworth, contra.

WHITEMARSH v. VAN EGMOND.

Award—Fraud.

Disputes having arisen between the plaintiff and defendant upon a building contract the plaintiff wished to have the value of his work for the defendant referred to arbitration. The defendant, who claimed that the work was not finished according to contract, agreed only to refer the question whether or not the work had been finished according to the plans and specifications in the contract, and that any submission to be drawn was to be referred to his solicitor, and approved by him, before he would execute it. The plaintiff procured a bond to be drawn and sent to the defendant's solicitor, who disapproved of it, as it left the whole matter open to arbitration, and returned it to the plaintiff's solicitor. The latter, acting on the instruction of the plaintiff's agent, who was informed of the disapproval, engrossed the bond, and the plaintiff's agent took it to the defendant, and procured his signature by leading him to believe that it had been approved. After an award was made thereunder the defendant discovered from his solicitor, for the first time, that he had never approved of the submission and immediately repudiated it.

Held, reversing the judgment of Galt, J., that an action on the award would not lie.

Osler, Q.C., for the plaintiff.

Bethune, Q.C., for the defendant.

WHIMSETT v. GIFFORD.

Landlord and tenant—Distress—Chattel mortgage.

The plaintiff was mortgagee of certain goods of one F. G., a tenant of his father, the defendant, C. G. The landlord, on the 17th February, 1883, went to the house of the tenant and declared that he seized everything for rent. He touched nothing and made no inventory. On 24th February he went again and told the tenant's wife that the property had been seized for rent, and to let no one take anything away. On 5th March the plaintiff, hearing that the goods were going to be sold for rent, took possession under his mortgage and removed the goods. A bailiff went the next day to levy for taxes in arrear, and the landlord gave him a distress warrant to take the goods for rent. The bailiff then took the goods which had been removed, and on the tenant's waiving an inventory, advertised and sold them within two days to a nephew of the landlord, who gave a cheque which was never presented.

Held, that the landlord's two visits of 17th and 24th February did not amount to a seizure.

Quare, whether a tenant can waive all statutable formalities as to inventory, etc., as regards the property of a stranger distrained upon.

The chattel mortgage contained no redemise clause, but did contain a clause that the mortgagee might take the goods if the mortgagor attempted to sell, dispose of, or part with the possession of the goods.

Held, that the mortgagee had the right under the circumstances to take the goods, although default in payment had not been made.

J. W. Kerr, for the plaintiff.

McPhillips, for the defendants.

PYATT v. MCKEE.

Landlord and tenant—Disputing landlord's title—Dower—Statute of Limitations.

P., being the owner in fee of the land in question, died intestate in September, 1853, leaving his wife (the present plaintiff) and two daughters, who resided on the land for a short time after his death. The widow made several leases of the land, and finally leased it to the defendant's ancestor, who, at the expiration of his lease, took a second lease with covenant to deliver up at the end of the term. He purchased the interest of one of the daughters, and a new lease was thereupon made to him by the plaintiff, the rent being reduced by one-third, because, as it was said, it was considered that the widow and daughters were each entitled to a

third of the rents. Pending this lease the tenant purchased the other daughter's interest, and at the expiration of the term in 1873 he refused to give up possession.

Held, affirming the judgment of Cameron, J., that the tenant and those claiming under him could not dispute the plaintiff's title without first giving up possession, and that he would not be allowed to say that her title as dowress was barred, and that the plaintiff was therefore entitled to judgment for an undivided one-third for her life and mesne profits for six years prior to action.

E. K. Cameron, for the plaintiff.

H. J. Scott, for the defendant.

THOMPSON v. CANADA CENTRAL RAILWAY CO.

Railway Company—Compensation—Gift of land.—Statute of limitations.

S. being the owner of lands through which the defendants desired to build their road, the Company with his written permission took possession without compensation and constructed their road, and had up to this time been in uninterrupted possession for more than ten years. The plaintiff claiming under S. now demanded compensation under the Railway Act.

Held, affirming the judgment of Galt, J., that S. having the right to accept any or no compensation, and having elected to take none, the Company then became entitled to the lands and the plaintiff could not succeed.

Held, per Galt, J., that the ten years' possession of the Company had extinguished the title of S., and those claiming under him, and vested it in the Company.

Gormully, for the plaintiff.

McTavish, for the defendants.

JOHNSON v. OLIVER.

Statute of Limitations—Possession of dowress.

H. C. R. died intestate in 1864 seised in fee simple of the land in question, leaving him surviving his widow and several heirs-at-law. The widow remained in possession from the time of the husband's death, until her own decease in 1881, and cultivated the farm. There was some evidence that she kept possession with the consent of the heirs for them, but the Court was of a contrary opinion. There was no evidence of written acknowledgment of their title. She devised the land to the plaintiff.

Held, that the possession of the widow was not a possession *qua* dowress, and that the title of the heirs-at-law had been thereby barred.

The Statute of Limitations begins to run in favour of a dowress in possession as against the heirs at the expiration of her days of quarantine.

John Bain, for the plaintiff.

Howland, for the defendant.

MOORE v. CENTRAL ONTARIO RAILWAY CO.

Railway company—Notice requiring lands—Notice of desistment.

Held, that a Railway Company having desisted once from their notice given under R. S. O. cap. 165, sec. 20, s-s. 15, could not desist pending an arbitration given under a second notice requiring the land.

The Company's arbitrator withdrew from the arbitration, which was proceeding under a second notice requiring the land, in deference to a notice of desistment given by the company.

Held, that the company could not take advantage of his withdrawal to object to the award which was not executed by him.

Dickson, Q. C., for the plaintiff.

Falconbridge, for the defendants.

COUNTY OF BRUCE v. McKAY.

Registrar—Dismissal during year—Return to municipality—Liability for excess of fees.

The defendant was Registrar of the County of Bruce, and during the year 1882 was discharged from office. The plaintiff brought this action for the recovery of the proportion of the amount of fees received by him up to the time of his dismissal, in excess of the amount allowed to be retained by him pursuant to R. S. O. cap. 111, sec. 104.

Held, affirming the judgment of Galt, J., that the dismissal of the defendant during the year did not deprive the plaintiffs of their right to recover the excess, which right does not depend upon the return to be made in each year.

D. W. Ross, for the plaintiffs.

Robinson, Q.C., for the defendant.

REGINA v. BENNETT.

Canada Temperance Act, 1878—Amendment of—Information—New offence—Appearance of defendant—Waiver of summons.

An information was laid against the defendant on 28th December, 1882, for having, on the 25th of December, sold intoxicating liquor in violation of the Canada Temperance Act, 1878. Upon a search made, intoxicating liquor was found on the premises on the 1st of January, 1883. On this evidence the information was amended so as to charge the keeping, and not the selling of liquor. The defendant was present and waived an adjournment and entered upon his defence. The magistrate having found the defendant guilty, drew up a conviction for keeping intoxicating liquors, which was returned to the Clerk of the Peace, and filed on 17th January, 1883. On the 27th of January, 1883, he drew up another con-

viction, the same in all respects as the first, with the exception that it was for keeping for sale intoxicating liquors. This was also returned and filed.

Held, that he had power to return the second conviction.

Held, that there was no variance between the evidence and the information to warrant an amendment of the latter, but that the evidence disclosed a new offence, and the amended information became in fact a new one, and the defendant, by his presence and entering upon his defence, had waived the service of a summons upon him.

Held, also, that it was no objection to the conviction that it was for keeping and selling while the information charged the keeping only.

Fullerton, for the defendant.

Fenton, contra.

GOODMAN v. REGINAM.

Gambling—Summary trial—Substitution of offence in information—Consent to trial on substituted offence—Sentence.

The plaintiffs in error were charged with having defrauded one C., by a game called three-card monte. They consented to be summarily tried. When brought up for trial the Crown Attorney asked for leave to substitute a charge of combining to obtain money by false pretences, the prisoners objecting. The trial proceeded without the consent of the prisoners obtained to be tried summarily for this offence. They were convicted and sentenced to one year's imprisonment.

Held, that their consent to be summarily tried on the substituted charge should appear, and that in its absence the conviction was bad.

Held, also, that it was bad in adjudging the sentence of one year, the Act, 40 Vict. cap. 32, only authorizing a sentence for any term less than a year.

McGregor, for the prisoners.

Irving, Q.C., for the Crown.

COUGHLIN v. CLARK.

Promissory note—Repeal of Stamp Act—Double stamping—Pleading want of stamps—Amendment.

Action on a promissory note which at its making was not stamped, but had been double stamped before action, but after the repeal of the stamp act. The defence denied the making of the note. At the trial leave to plead insufficient stamping was refused on account of the repeal of the Stamp Act, but the plaintiff was allowed to amend by adding allegations showing the consideration. Wilson, C.J., gave judgment for the plaintiff.

Held, that the judgment was right.

Per Hagarty, C.J. The learned Judge was not bound to allow a plea of insufficient stamping to be added by way of amendment under the circumstances.

Per Armour and Cameron, JJ. The amendment should have been allowed. The note, even if unstamped or insufficiently stamped was admissible in evidence of the debt to the plaintiff, the Stamp Act not prohibiting such a use of it.

Per Cameron, J. It is necessary under the Judicature Act and rules to plead specially want of stamps. The unstamped note was in its inception a valid transaction between the parties to it, but became invalid by neglect to stamp it. The repeal of the Stamp Act leaves the law where it was before these Acts were passed, and the note was therefore valid.

Rose, Q.C., for the appeal.

Robinson, Q.C., and Justin, contra.

HARRON v. YEMEN.

Mortgage—Second mortgage—Power to second mortgagee to pay arrears on first mortgage and distrain—Purchase by second mortgagee under power in first mortgage—Distress.

The plaintiff mortgaged his land to the F. L. & S. Co. by a mortgage which contained a distress clause, and gave a second mortgage to the defendant by which it was agreed between them, that if default was made in payment of interest to the Company the defendant should be at liberty to pay it and should have the same remedy for its recovery from the mortgagor as the Company had. Default was made, and the Company exercised their power of sale, and the defendant became the purchaser. After signing a contract for the purchase he distrained the goods of the plaintiff for the interest that had fallen in arrear to the Company. Shortly afterwards he obtained a formal conveyance of the land expressed to be under the power of sale in the Company's mortgage.

Held, that the plaintiff's estate having paid the mortgage debt to the Company in full, the defendant could not be said to have paid the interest in arrear so as to entitle him to distrain therefor.

A. Lefroy, for the plaintiff.

J. K. Kerr, Q.C., for the defendant.

GIBSON v. MIDLAND RAILWAY CO.

Railway—Overhead bridge—Death therefrom—Illegitimate son.

The plaintiff, as administratrix, sued the defendants, under 44 Vict. cap. 22, sec. 7, (O.) for the death of her illegitimate son, a brakeman on the defendants' railway, who was killed by being carried against a bridge not of the height required by that Act while on one of their trains passing underneath

it. The bridge belonged to another railway company who had the right to cross the defendants' line in that way, and though the time allowed by the statute for raising the bridge had expired, they had not done so. The jury found that the defendants had been guilty of negligence in not raising, or procuring to be raised, the bridge.

Held, that the plaintiff was not entitled to recover, (i) because section 7 of the Act applies only to bridges within the control of the company whose servant has been injured, and (ii) the Act was intended to give no greater right to recover than Lord Campbell's Act, and therefore the plaintiff's relationship to the deceased precluded her from recovery.

Clute, for the plaintiff.

Bethune, Q.C., for the defendants.

LEE v. McMAHON.

Sale of land—False representations—Laches—Counterclaim for purchase money.

The plaintiffs induced the defendant to purchase land in Portage La Prairie, N. W. T. by exhibiting to him a map showing the property to be in the business portion of the town and by representing that this was true. The defendant applied to persons on the spot for information and was told that the representations made were incorrect. But he swore that one of the plaintiffs told him that his informants were interested in depreciating the property, and that on those representations he purchased, paying \$500 cash and giving a mortgage for the balance. He could have sold the property shortly afterwards for more than he gave for it. After a lapse of six months he went to Portage La Prairie and found that the representations were untrue and he then repudiated the bargain. This action was brought on the mortgage and the defendant counter-claimed for the cash payment of purchase money.

Held, affirming the decision of Armour, J., that the defendant had been induced by false representations to enter into the purchase, but, reversing the judgment, that he had not disentitled himself to relief by laches, that the mortgage should be delivered up to be cancelled and that his counterclaim for the money paid without interest should be allowed on his re-conveying the estate free from incumbrances done by him.

Clute, for the plaintiffs.

Britton, Q.C., for the defendant.

COMMON PLEAS DIVISION.

[BURTON, J. A., JUNE, 1883.]

VICTORIA MUTUAL FIRE INS. CO. v. DAVIDSON.

*Principal and surety—Division Court clerk—Special agreement for fees—
Discharge of sureties—Entries in books—Evidence.*

After the defendants had become sureties for a Division Court Clerk, a special arrangement was made between the plaintiffs and the clerk, under which the latter was to receive no costs but disbursements in all suits entered with him by the plaintiffs in which nothing was realized, the clerk on his part guaranteeing in all cases that the Court had jurisdiction. This was subsequently varied by giving to the clerk fifty cents in addition to the disbursements in such suits. Periodical statements were made from time to time according to the agreement, and a cheque given for the balance thus shown. It was afterwards discovered that the statements were incorrect and that moneys collected by the clerk had not been paid over.

Held, that the statements were not conclusive against the plaintiff.

Held, also, that the special arrangement with the clerk discharged his sureties from liability.

The cases deciding that entries in the books of an officer are evidence in his lifetime against his sureties questioned.

[HAGARTY, C. J., JUNE, 1883.]

STANTON v. COUNTY OF ELGIN.

*County Attorney—Fees—Disallowance by Provincial Treasurer—Disallow-
ance by Board of Audit—Mandamus.*

C., on being brought before the County Judge on twenty-five charges of larceny and having elected to be tried by a jury, was tried at the ensuing assizes and convicted on three of the charges, the remaining twenty-two not being tried. Under an order in council the County Attorney is entitled to \$4.00 on receiving and examining every information, etc., connected with criminal charges for the Court of Assize, upon the certificate of the Crown Counsel that such fee should be allowed. The plaintiff, a County Attorney, obtained the Crown Counsel's certificate for and charged a fee of \$4.00 in each of the above twenty-five cases, which passed the Board of Audit; but upon the twenty-two untried cases being disallowed by the Provincial Treasurer and his decision communicated to the Board of Audit, they deducted the amount from a subsequent account.

Held, that a mandamus would not lie to the Board of Audit to rescind their order, the ruling of the Provincial Treasurer being a good reason for their deducting the amount, which was a matter for their discretion.

A fee of fifty cents is allowed to the County Attorney for attendance in the County Judge's Criminal Court, and making the necessary entries for each prisoner not consenting to be tried summarily. The plaintiff charged fifty cents for actual attendances, on and making entries in each of the twenty-five charges preferred against C., which were separately read over to him and his election taken thereon. Three only of the cases were allowed by the Board of Audit on the ruling of the Provincial Treasurer.

Held, that a mandamus would not lie to the Board to allow the charges.

The plaintiff claimed \$1.00 for an affidavit verifying jurors' book, and \$1.00 for certificate drawn up by him for the County Judge to sign.

Held, that these fees could not be allowed and therefore a mandamus would not lie.

Read, Q.C., for the appellant.

John Bain and Raines, for the Board of Audit.

Scott, Q.C., for the Attorney General.

[THE DIVISIONAL COURT, 29TH JUNE, 1883.]

THE REAL ESTATE LOAN AND DEBENTURE CO. v. THE
METROPOLITAN BUILDING SOCIETY.

Purchase of securities for bulk sum—Deficiency on one security—Recovery of deficiency—Fraud.

The plaintiffs negotiated for the purchase from the defendants of certain mortgage securities and other assets of the defendants on the basis of an eight per cent. investment, and a schedule was prepared by the defendants exhibiting each security. Finally it was agreed that a bulk sum of \$40,000 should be paid for the scheduled securities as exhibited. After a deed of assignment of the securities had been executed, the plaintiffs discovered that one of the mortgages was \$780 less in value than had been stated, and they claimed to recover that amount.

Held, that there could be no recovery, for the evidence showed that the bulk sum agreed upon was to cover all deficiencies and error and mistakes in value, at all events to a reasonable amount, that the amount in question was reasonable, and that there was no fraud or misrepresentation.

J. K. Kerr, Q.C., and *A. C. Galt*, for the plaintiffs.

Robinson, Q.C., for the defendants.

RADFORD v. THE MERCHANTS' BANK.

Banks and banking—Sale of machine by bank—Warranty—34 Vict. cap. 5 (D)—Res judicata.

An action against an incorporated bank for breach of a warranty on a sale of a machine by the bank will not lie, the Banking Act prohibiting the buying and selling of goods and merchandize by banks.

In an action in a Division Court against the now plaintiff on the notes given by him for the machine, the matter was decided against him.

Held, that the matter was *res judicata*.

Smythe, for the plaintiff.

Britton, Q.C., for the defendants.

GARSON v. GARSON.

Agreement between father and son—Specific performance.

The defendant wrote to his son, the plaintiff, who had left home to work for himself, that if he would return he would give him 50 acres of his farm and a share of the cattle and sheep when the plaintiff got married, but if he stayed away he would sacrifice his own and his father's interests. Upon receipt of the letter the plaintiff returned and remained on the farm working it with his father, except at certain times, when he went away to work for wages for himself. It was proved that the father had pointed out the 50 acres which he intended to give to his son, and the plaintiff entered and erected a house thereon, with his father's approval, and occupied it with his family—he having married in 1879.

Held, that the plaintiff was entitled to specific performance of the agreement.

Falconbridge, for the plaintiff.

Shepley, for the defendant.

LEADER v. NORTHERN RAILWAY CO.

Railway—Consignment of grain.—Right of railway company to warehouse with other grain.

The plaintiff consigned and shipped by the defendants' railway to D. at their Brock Street station, grain which had been sold by sample, signing a consignment note and taking a shipping receipt. The grain was carried to Toronto and warehoused by the defendants in their elevator, under, as they contended, a right conferred on them by the conditions of the shipping contract. They then tendered to the consignee grain of the same grade as that received by them from the plaintiff which the consignee refused to

accept. The shipping contract showed that a distinction was made between grain consigned to and that not consigned to the defendants' elevator.

Held, that the defendants under their conditions had only the right to warehouse in their elevator grain shipped thereto, and not grain shipped to another specific address, and that therefor the plaintiff was entitled to recover the damages sustained by the non-delivery of the specific grain shipped by him.

Creasor, Q.C., for the plaintiff.

Boulton, Q.C., for the defendants.

KILLIHER v. MCGIBBON.

Vessel—Sale of—Informal agreement—Loss—Liability of purchaser.

The defendant purchased the interest of the plaintiff in a vessel under an agreement which did not comply with the requirements of the Act. Afterwards, the master who had been appointed by the owners deserted her, whereupon the defendant took possession and appointed a master, by whose negligence the vessel was lost.

Held, that the plaintiff could not recover his purchase money from the defendant under the informal agreement, but that the defendant was liable to him for his loss occasioned by the negligence of the master appointed by him.

McMichael, Q.C., for the plaintiff.

Osler, Q.C., for the defendant.

HAINES v. JOHNSTON.

Division Courts Act—Breach of duty—Notice of action—Personal service—Computation of time.

By section 231 of the D. C. Act, any action against any person for anything done in pursuance of the Act shall be commenced within six months, and notice of action and of the cause thereof is to be given to the defendant one month at least before the action.

Held, (i) that personal service of the notice was not necessary, service on the defendant's wife being sufficient, (ii) that the court in which the action is to be brought need not be mentioned, and *semble*, if required, a notice that it would be brought in the High Court of Justice without mentioning any Division, was sufficient. (iii) That in computing the month, the day on which the fact complained of took place must be excluded.

Dunbar, for the plaintiff.

Osler, Q.C., for the defendant.

WALLACE v. HUTCHINSON.

Married woman—Separate estate—Dower.

In an action against a *feme covert*, married in 1871, on a promissory note made by her, the only property which it was proved she possessed was a right to dower in lands of a former husband. The learned Judge, at the trial, having directed that the defendant's separate property vested in her or in a trustee for her at the date of the note, and at the time of judgment, should be charged with the payment of the plaintiff's claim, the Court refused to entertain a motion made to set aside the judgment.

Rose, Q.C., for the plaintiff.

Osler, Q.C., for the defendant.

REGINA v. FEE.

Deputy Judge—Order in Council—Validity of appointment—Proof of order in Council—Presumption—Absence of County Judge.

The prisoner was convicted of perjury, alleged to have been committed in a cause tried at a Division Court held by H. under a commission issued by the Governor-General-in-Council, appointing him Deputy Judge of the County Court of the County of Victoria during pleasure and the absence of the County Judge, under leave of absence granted him by an order in Council.

Held, that it was not necessary for the Crown to prove the order in Council granting the leave of absence, for its existence, and that the commission of the Deputy Judge had not become effete by lapse of time, must be presumed in accordance with the rule that the Court will presume that a person acting in a public capacity was properly appointed and duly authorized to act, and the onus lay on the prisoner to show the contrary.

Held, also, that the commission was valid under R. S. O. cap. 42, and that it was not essential to its validity that the County Judge should be absent from the County.

Scott, Q.C., for the Crown.

Osler, Q.C., for the prisoner.

BENNETT v. THE GRAND TRUNK RAILWAY CO.

Railway—Crossing on railway premises—C. S. C. cap. 66, secs. 104, 145—Evidence—New trial.

A railway crossing on the Company's premises for the convenience of passengers and others in going to and from the station on railway business is not a public crossing, highway, or place, within C. S. C. cap. 66, sec. 104,

so as to require the statutory signals to be given by trains approaching it ; but, nevertheless, due care must be taken to prevent damage being sustained by reason of such crossing.

Held, that sec. 145 applies to the Railway Company's grounds in cities, towns and villages, as well as to the limits outside such grounds.

On the evidence the Court was of opinion that the verdict for the plaintiff was wrong, and a new trial was directed.

Fullerton and Schoff, for the plaintiff.

Bethune, Q.C., for the defendants.

REGINA v. GOUGH.

Criminal law—Indictment—Omission of "feloniously."

An indictment, purporting to be under 32-33 Vict. cap. 22, sec. 45, which charged the defendant with "unlawfully and maliciously," instead of "feloniously," maiming and wounding two horses &c., was

Held, bad and quashed.

Smythe, for the prisoner.

Scott, Q.C., for the Crown.

LUCAS v. KNOX.

Dower—Quarantine—Eviction of dowress' attendant—Trespass.

Held, that the right of a dowress to occupy the mansion house during her days of quarantine is not merely a personal right, but that she is entitled to have reasonable and proper attendance and companionship, and an action will lie for the eviction of her companion in attendance during that time.

Burdett and Arnoldi, for the plaintiff.

Northrup, for the defendant.

COCHRAN v. BOUCHER.

Chattel mortgage—Collateral security—Principal and surety—Premature sale.

H. took a note from the plaintiff and his wife as surety, and a chattel mortgage on the goods of both as collateral security. He discounted the note at a bank and with the proceeds paid executions against C., and before the note matured he seized and sold the goods comprised in the mortgage, claiming that there had been a breach of it, refusing to allow the mortgagors

to redeem. There were more than enough of the husband's goods to satisfy the mortgage.

Held, that, the note being the principal security and the mortgage merely collateral, while the note was in the bank's hands they were entitled to the mortgage, and H. could not proceed under it, and further, that the goods of the wife who was merely a surety should not have been sold at any rate.

Held, also, that the sale was premature, the jury having found that there was no breach of the mortgage, and the wife was entitled to recover the value of the goods sold.

Lash, Q.C., for the plaintiff.

Moss, Q.C., for the defendant.

CARTWRIGHT v. HINDES.

Ca. Sa.—Setting aside—Appeal to Divisional Court—Misleading statement in affidavit.

Held, that the Divisional Court may review the action of a Judge setting aside a writ of *capias ad satisfaciendum* and the arrest thereunder, as also the action of the Judge who made the order for arrest.

Held, also that a statement in the affidavit on which the order for arrest issued, that the defendant had made "an assignment of all his property" without adding that it was for the general benefit of all his creditors, was a misleading statement as inducing a belief that the assignment had been made for a fraudulent purpose, and therefore on that ground the order could not be supported.

Machar and Aylesworth, for the plaintiff.

MacLennan, Q.C., for the defendant.

CHANCERY DIVISION.

[WILSON, C. J., 6TH JUNE, 1883.]

RYAN v. FISH.

Dower—Demand—Detention—Damages.

The Dower Procedure Act, R. S. O. cap. 55, has not taken away or diminished the right of a dowress to damages against all persons, and in all cases, in which they were recoverable before the 10th August, 1850. Such damages include mesne profits as well as damages for detention.

The defendant, who was the grantee of the husband's devisee, appeared to the writ, and acknowledged that he was the tenant of the freehold, and consented that the plaintiff might have judgment for dower. The plaintiff

delivered a statement of claim, claiming damages for detention of her dower. She had made a demand a few days before issuing the writ. The defendant pleaded that he had always been ready to render dower to the plaintiff. At one time, before action, he had offered \$122 to the plaintiff for damages. The Court, though of opinion that the plea of *tout temps prist* was not correct, read it as if applied to the time of the defendant's tenancy only, on condition of his paying the \$122 to the plaintiff.

Semble, that the plaintiff was entitled to a recompense for the detention subsequent to her demand only.

Bethune, Q.C., for the plaintiff.

Lash, Q.C., and *King*, for the defendant.

[14TH JUNE, 1883.]

MITCHELL v. SYKES.

Del credere commission—Sale to repay advances—Auction.

By an agreement between the plaintiff and defendant the defendant was to manufacture goods and consign them to the plaintiff for sale upon a *del credere* commission, to fill such orders as he might receive for such goods, to advance to the defendant on the consignment 75 per cent. of the wholesale trade value thereof, and to sell all the goods manufactured by the defendant.

Held, that the plaintiff could sell by auction, as well as by private sale, any goods of the defendant's on his hands, undisposed of, to repay himself the advances upon them.

John Bain, for the plaintiff.

G. H. Watson, for the defendant.

[FERGUSON, J., 23RD JUNE, 1883.]

CAREY v. CITY OF TORONTO.

Lease according to plan—Lane—Closing up lane.

The plaintiff, the defendant M, and others leased lands of the City of Toronto at auction. Plans of the property were prepared by the city and exhibited, and the bidders purchased by reference thereto, and their contracts were attached to copies of the plans. Upon the plan were shewn lots fronting on three streets forming three sides of a rectangular figure, viz. ten lots on B. street, ten lots on C. street parallel thereto, and five lots on H. street at right angles to the others. In rear of the lots on B. and C. streets there were lanes communicating with H. street, and in rear of the lots on H. street there was a lane joining the two other lanes. The plaintiff agreed to lease the lot at the corner of B. and H. streets, and the defendant M. agreed to lease the five lots on H. street; M. desired to close

up the lane in rear of his lots, and the City had prepared and registered a plan shewing that lane closed up, but the plaintiff refused to accept his lease according to such a plan, and the City finally prepared and registered a plan identical with that exhibited at the sale according to which the plaintiff's lease was made. The learned Judge at the trial found that the lane attempted to be closed up was of benefit to the plaintiff's property. M. closed it up with notice of the plaintiff's claim.

Held, that the plaintiff was entitled to have it re-opened, and to an injunction restraining the defendants from closing it.

S. H. Blake, Q. C., for the plaintiff.

Moss, Q. C., for defendant M.

McWilliams, for the City of Toronto.

W. Mortimer Clarke, for other defendants.

[PROUDFOOT, J., 4TH JULY, 1883.]

CLARKE v. THE VILLAGE OF PALMERSTON.

Municipal debentures—Special rate—Neglect to levy—Mandamus.

It is the duty of a municipal council to assess in each year the sums to be levied for taxes and the clerk is to place them in the collector's roll; he is not in any year to insert in the roll any sums which the Council has not directed that year to be raised.

Where a Municipal Council had neglected to levy a special rate for the interest and sinking fund on debentures issued to raise a bonus for a railway,

Held, that a mandamus should issue to compel the Council to levy the rate for that year, but, not to levy future rates.

Semble, that the writ would not lie to levy a rate to pay arrears.

NEW BRUNSWICK

In the Supreme Court.

[NOVEMBER, 1882.]

KING *et al* v. MURRAY.*Will—Estate durante viduitate—Devise of income and profits.*

A testator made the following devise: "After paying off all my just debts and funeral expenses, I devise and bequeath all my property, real and personal, to be equally divided among my children, without any distinction whatsoever, so soon as the youngest shall attain the age of twenty-one years, reserving to my dear wife, so long as she shall remain my widow, the revenues and incomes to be derived therefrom, for her own support and the education and maintenance of my children."

Held, that the widow took an estate in the land during her widowhood, and that her right to lease it while her estate continued, would not be affected by a mortgage given by the owners of the estate in remainder.

Doe *dem.* APPLEBY v. SECORD.

Adjoining land-owners—Conventional line—Acts of possession—Possessio pedis.

The lessor of the plaintiff and the defendant were owners of adjoining lands, and they and those through whom they respectively claimed, had occupied on either side of a line that had been agreed upon more than twenty years before, and along which a fence had been erected and continued for over twenty years. The *locus in quo* was a portion of the land adjoining this fence and on defendant's side of it.

Held, that acts of possession by the defendant and those through whom he claimed, on any part of the land on his side of the fence, would extend his possession up to the agreed line, and that a *possessio pedis* up to the line was not necessary to support his title by possession.

HARRIS v. FOWLE.

False pleas—Setting aside—Judge—Relationship of wife to wife of party.

In order to justify the setting aside a plea under sec. 88 of the Con. Stat. cap. 37, as a general rule, it should be a plea which is false to the knowledge of the defendant.

It is no legal disqualification to a Judge taking part in a case, that his wife is the niece of the wife of one of the parties to the cause,

TURNER v. McMANN.

Ship's husband—Part owner of vessel—Agent of other part-owners—Accounts stated—Crediting agent not payment of money to principal—Right of counsel to re-examine witness on matters brought out on cross-examination.

The plaintiff and defendant with others were part owners of a vessel of which the defendant acted as ship's husband. The course of business was for the defendant to make up the accounts of each voyage at its close, and to apportion the earnings of the vessel amongst the part owners according to their respective shares, and the amounts so apportioned were then carried to the credit of each part owner in account with the ship's husband, and held subject to his order. The earnings of the several voyages so credited were entered separately in the book of the ship's husband, and the balances were not carried forward as a continuous account.

In an action by the plaintiff against the defendant for his share of the earnings,

Held, by Weldon, Wetmore and King, JJ., Palmer, J., dissenting, that each voyage was a separate adventure, and that the balances so credited were sufficient accounts stated to entitle the plaintiff to bring an action at law.

Where A. employs an agent to receive money for him from B. and the agent instead of receiving money, consents that the amount shall be credited by B. in his own account with him, B. is not thereby discharged.

In the action by A. against B. for the amount credited the agent, A.'s counsel on the cross-examination of B., questioned him without objection with a view of shewing that the amount of the agent's indebtedness was disputed, and when B.'s counsel proceeded to re-examine him, A.'s counsel objected, and the learned Judge sustained the objection and ruled out the evidence as irrelevant.

Held, (Weldon, J. dissenting), that the evidence was improperly rejected.

[FEBRUARY, 1883.]

JONES v. LANDRY.

Bail bond—Forfeiture of—Delivered up to be cancelled—Affidavit for bail and entry docket—Delay in filing.

Where a defendant had given a bail bond, but did not put in special bail till after the forfeiture of the bond, though before the assignment of it to the plaintiff, the Court ordered the bail bond to be delivered up to be cancelled—the plaintiff not having filed the affidavit for bail, nor the entry docket in the cause till after the special bail was put in, and more than thirty days after the execution of the capias.

*Doe dem. GALLANT v. ROE.**Ejectment—Demand of particulars of premises—Stay of proceedings.*

In ejectment where there were several tenants in possession, and one of them filed a memorandum of appearance and gave notice thereof to the plaintiff's attorney and demanded the particulars of the premises, which the plaintiff's attorney promised to give, but afterwards, without giving the particulars, signed judgment against the casual ejectors, and turned the tenants out of possession, the Court set aside the judgment and *habere facias*.

A demand of particulars in ejectment operates as a stay of proceedings.

*Ex parte BYRNE.**Habeas Corpus—Order of discharge under Con. Stat. cap. 41—Whether Court has power to set aside.*

An order of a Judge made under the Con. Stat. cap. 41, discharging a prisoner from custody cannot be set aside or revised by the Court.

*Doe dem. RANKIN v. ANDREWS.**Insolvent Act of 1869—Title of Assignee to real estate—Proof of deed of composition and discharge.*

The title of an assignee to real estate, under the Insolvent Act of 1869 is only statutory ; and a purchaser from him under the authority of a deed of composition and discharge executed by the insolvent and his creditors, in order to establish his title, must prove the execution of the deed of composition and discharge, and that the conveyance was conformable to its terms.

*MARKS v. NEWCOMBE.**False imprisonment—Execution—Omission of name of parish—Imprisonment for less number of days than justice might award—Enlargement of return—Search for goods and chattels.*

In an action for false imprisonment brought against a constable for arresting upon an execution in form (K) issued out of a Justice's Court,—

Held, 1. That as the name of the county appeared in the execution, the omission of the name of the parish was not a substantial deviation from the prescribed form, and therefore the execution was valid.

2. That a debtor cannot complain that the execution directed him to be imprisoned for a less number of days than the justice might have awarded.

3. That the date of the enlargement of the return of an execution need not appear on the execution, but may be shewn by oral evidence.

4. That if a debtor states that he has no property wherewith to satisfy an execution, the constable is justified in arresting him without searching for goods and chattels.

GOOD v. GOOD.

Slander—Misdirection—New trial.

In an action of slander, where there is undisputed evidence that the words complained of applied to the plaintiff, it is misdirection to leave to the jury to find whether defendant, when he spoke the words, intended the plaintiff, without pointing out such evidence to them.

BREWER v. BREWER, *et al.*

Infant under fourteen years of age—Guardian in Socage—Trespass to land.

Quære, Whether an infant under fourteen years of age, her mother living, can maintain an action for trespass to land, or whether the mother as guardian in Socage, is not alone entitled to sue.

Such a question cannot be raised under the pleas of not guilty, and that the land was not the plaintiff's, but the defendant should traverse the plaintiff's possession of the land.

KERR, *Executrix* v. SQUIRES.

Statute of limitations—Abatement for matter of form—Con. stat. cap. 85, sec. 13.

An action was begun in a Justice's Court by the title of "The estate of the late R. K.," against the defendant, and a nonsuit was granted because the name of the executrix was not stated in the summons;

Held, that the suit abated for matter of form, and prevented the plaintiff's claim being barred by the Statute of Limitations, under section 13, of cap. 85 Consol. Statutes.

REGINA v. ELLIS.

Criminal law—Adultery—Marriage in foreign State—Proof of marriage law in such State.

On an indictment of E. for adultery with L. R. it was proved that L. R. and J. R., who were citizens of the United States, were married in the State of Maine by a clergyman who testified that it was a part of his duty to solemnize marriages. E. was convicted, but, on a motion to quash the conviction, it was held that it should have been proved that the marriage was valid under the law of Maine, and the conviction was quashed.

[MARCH, 1883.]

BELL, *Appellant* v. CARLYLE, *Respondent*.

Agreement—Rescission of—Trover—Conversion—Third party having property.

B. agreed with C to give the latter a sleigh in exchange for a sewing machine, and delivered the sleigh to C. The latter finding that the sleigh required some repairs which B. should have made, sent it back for the purpose of having the repairs made, but not intending to rescind the agreement. B. sent the sleigh to the shop of D. for the purpose of having the repairs made. Afterwards C. demanded the sleigh of D., who refused to let him have it unless a charge of \$9 for work done on it originally for B., besides his charges for the present repairs and storage, was paid.

Held, that C. could maintain trover against D. for the value of the sleigh, and that the latter could not complain of the Judge leaving it to the jury to find whether the title to the sleigh was in B. or C.

ESTABROOKS v. MCGOWAN.

WARD v. REED.

County Court Appeal—Rule—Where appeal allowed—Costs.

Where an appeal is taken to the Supreme Court from an order of a County Court Judge granting a nonsuit and the Supreme Court directs that the nonsuit be set aside, it is not necessary for the rule to go further than state that the Court allows the appeal and orders that the nonsuit granted in the Court below be set aside.

The Supreme Court on an appeal from a County Court has no control over the costs in the Court below.

FRANKE *et al.*, Appellants, v. McGRATH, Respondent.

Equity—Jurisdiction—Foreign defendant—Pleading—Multifariousness.

A partnership agreement between the plaintiff and defendants was made in New York for the purpose of cutting ice in New Brunswick and forwarding it to New York for sale. The defendants demurred for want of jurisdiction ; because all parties were residents of the United States of America, the accounts were to be settled, and the contract was made there, which demurrer was overruled.

Held, on appeal by Palmer and King, JJ., (Weldon and Wetmore, JJ., dissenting) that the demurrer was rightly overruled.

The bill set out the partnership agreement, and alleged that F. was to advance money to carry on the business of cutting, storing, and forwarding ice ; that the plaintiff went to New Brunswick to perform his part of the agreement in cutting and storing ; that the amount of money agreed upon was not all advanced by F., whereby and by F.'s interference, the plaintiff could not successfully carry on the business and suffered loss ; that F. would not advance more money unless the plaintiff signed a new agreement, whereby the partnership was ended, for which he was to get \$250 ; that this sum was not paid, though the agreement had been signed ; that by the agreement the plaintiff was to act as agent of F. who was to sell the ice, pay himself his advances, and pay half the profits to the plaintiff for his services ; that after it was signed F. would not permit the plaintiff to have anything to do with the business, and he lost large sums and had incurred debts in the business ; that the defendant intended to take the ice out of the Province for sale ; and that F. intending to deprive the plaintiff of his rights, had transferred the ice to the other defendants. The bill charged that the second agreement was fraudulent and inequitable, and asked for an injunction restraining the shipping of the ice by the defendants until the plaintiff's rights were ascertained and secured, and that the accounts might be taken and the amounts payable to the plaintiff paid to him.

Held, by Palmer and King, JJ., (Weldon and Wetmore, JJ., dissenting,) on appeal from the Judge in equity overruling demurrers for want of equity and multifariousness, that the demurrers were rightly overruled.

MANITOBA.**In the Queen's Bench.**

[TAYLOR, J., JUNE, 1883.]

BANK OF NOVA SCOTIA v. LYNCH.

Bills of exchange and promissory notes—English bills of exchange act—Service.

A writ of summons under the Imperial Acts, 18 & 19 Vict. cap. 67, as to summary remedies upon bills of exchange and promissory notes, was issued against the defendant, a resident of Manitoba. Before service of the writ, the defendant went to England to remain for some time. The plaintiff applied for *ex parte*, and obtained, an order for substitutional service of the writ upon the defendant's wife who remained in Manitoba.

Held, on an application to set aside the order for substitutional service, that notwithstanding the provision of the Act, that the writ in such case shall be personally served, yet under the general provisions contained in Con. Stat. ch. 31, sec. 35 (Man.), such an order may be made upon a proper case for substitutional service being made out.

Darby, for plaintiffs.

Perdue, for defendants.

(Reported by W. E. Perdue, Esq., Barrister-at-Law.)

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TRUSTEE AS PURCHASER OF THE TRUST ESTATE.

THERE is a rule, as familiarly expressed, that a trustee for sale shall not purchase from his *cestui que trust* while the relationship continues; but more correctly it is stated to be that such a purchase will be set aside at the election of the beneficiary applying within a reasonable time. For it has been asserted that there is no rule that a trustee to sell cannot be the purchaser, but that the sale to him shall stand clogged with the equity of the *cestui que trust* to have a re-sale (a). Sir R. P. Arden, M. R., is emphatic even to impatience in saying, "It was perversion of the rule to say no trustee should buy. There never was such a rule" (b).

Though it was intimated at one time by Lord Thurlow that the principle upon which the Court proceeded was, that the trustee should not make an advantage by his purchase (c), that was more lately denied by Lord Eldon, who is reported to have said (d) that Lord Thurlow, subsequent to the decision of *Fox v. Mackreth*, admitted that he was mistaken in that.

The difficulty of examining upon satisfactory evidence, in the greater number of cases, whether the trustee has gained

(a) *Campbell v. Walker*, 5 Ves. 678; *Whichcot v. Lawrence*, 3 Ves. 740.

(b) *Campbell v. Walker*, Supra. at p. 680 a.

(c) *Fox v. Mackreth*, 1 W. & T. L. C. 123.

(d) *Ex parte Lacey*, 6 Ves. 626 a.

any advantage, is pointed out by Lord Eldon in *Ex parte Lacey*, supra. "Suppose," said his Lordship. "a trustee buys an estate, and by the knowledge acquired in that character discovers a valuable coal mine under it, and locking that up in his own breast, enters into a contract with his *cestui que trust*, if he choose to deny it, how can the Court try that as against his denial? The probability is that a trustee who has once conceived such a purpose will never disclose it, and the *cestui que trust* will be effectually defrauded."

And in *Ex parte Bennett* (e) it was held that to set aside a purchase by a trustee of the trust property it was not necessary to show that he had made an advantage.

So in *Harrison v. Harrison* (f), which was a case of a trustee selling bank shares of his own to his *cestui que trust*, Mowat, V.C., said, "The transaction cannot be sustained, for it is a settled rule that an agent or a trustee authorized to buy cannot buy from himself; and that if he does so without disclosing the fact, his principal or *cestui que trust* may repudiate the transaction when it comes to his knowledge, and has this right whether the price was fair or not. Such transactions are so dangerous that, to prevent them, they are wholly forbidden, and are not merely declared void where damage has arisen from them, or where fraud was mixed up with them."

And in *Ex parte James* (g), Lord Eldon reiterated that it was not his opinion "that it must be shown that the trustee has made an advantage as it is stated in some of the authorities."

Such a purchase is, in fact, not a purchase from the *cestui que trust*, but a purchase by the trustee from himself. "The rule I take to be this," said Lord Eldon, "not that a trustee cannot buy from his *cestui que trust*, but that he shall not buy from himself" (h). The trustee for sale is

(e) 10 Ves. 393.

(f) 14 Gr. 586, 592.

(g) 8 Ves. at p. 348.

(h) 6 Ves. 626.

bound by his duty to the *cestui que trust* to acquire all the available knowledge to enable him to place the property in the market to the greatest advantage. That being so, "the question what knowledge he has obtained, and whether he has fairly given the benefit of that knowledge to the *cestui que trust* which he always acquires at the expense of the *cestui que trust*, no Court can discuss with competent sufficiency or safety to the parties" (i).

From this assertion of the impossibility of trying such a case, we come to a less rigid opinion as to the extent of the rule, in *Ex parte Bennett* (j). "The reason is that it would not be safe with reference to the administration of justice in the general affairs of trust that a trustee should be permitted to purchase; for human infirmity will in very few instances permit a man to exert against himself that providence which a vendor ought to exert in order to sell to the best advantage, and which a purchaser is not at liberty to exert for himself in order to purchase at the lowest price."

That such instances have occurred and do occur the contents of the reports exist to testify, and sometimes a test of the price given by the trustee is made by a re-sale, the trustee being held to his purchase meanwhile, and sometimes the conduct of the trustee in and about the transaction is made the main enquiry.

For instance, in *Sidney v. Ranger* (k) the plaintiff, a solicitor, having the conduct of the cause became the purchaser under a feigned name and the sale was confirmed; but the defendant, subsequently discovering the facts connected with the purchase, made an application to the court upon which the property was ordered to be put up for sale again at the price at which the plaintiff had purchased it, and if there should be no higher bidder the plaintiff was to be held to his purchase. And in *Guest v. Smyth* (l), a like order was made. Though this order was discharged upon

(i) *Ex parte James*, 8 Ves. 348.

(j) 10 Ves. 394.

(k) 12 Sim. 118.

(l) L. R. 5 Chy. 551.

appeal, the principle upon which it was made was affirmed, the appeal being allowed upon the ground that the case did not come within the established rule which forbids certain classes of persons to purchase. So in *Ex parte Hughes* (m), where there was a sale by assignees in bankruptcy to one of the creditors who had been previously consulted as to the mode of sale, and contrary to an order that receivers should be appointed to sell, a re-sale was directed; but the purchaser was to be held to his purchase if there was no further bidding on the re-sale. The test as to undervalue was no doubt here applied.

It may well be argued, however, that if the purchase by the trustee were originally right, the fact that he either presently or subsequently made an advantage out of it could not by relation back make it wrong. If the purchase were originally wrong, the relationship of trustee and *cestui que trust* would still subsist with respect to the property, and any profit ultimately made by the trustee would be the advantage or gain of the *cestui que trust*. If it is allowable for the trustee to purchase, it is allowable for him to sell again at a profit, if he can. If it be not allowable for him to sell again at a profit without accounting for it to the *cestui que trust*, then that must result from his being still a trustee of the property for the *cestui que trust*, and therefore the relationship had never been determined. And so the question would always resolve itself into this—shall the trustee be compelled to hold for *cestui que trust* the profit which he has made? And that will depend upon whether or not the relationship of trustee and *cestui que trust* still subsists with respect to the property, or whether it has been properly determined.

In one case this is well exemplified (n). Lord Eldon said, “Lord Alvanley certainly held, and I think justly, that long acquiescence under a sale to a trustee (for that is the principle of his decree) ought to be taken as evidence that as between the trustee and the *cestui que trust* the relation

(m) 6 Ves. 617.

(n) *Parkes v. White*, 11 Ves. 226.

had been abandoned in the transaction, and that in all other respects it was fair; for the mere circumstance of abandonment would not be quite sufficient."

Here it is evident that the court could have decreed payment to the *cestui que trust* of the profit made by the trustee, only upon the ground that the ancient fiduciary relationship was still a subsisting one. To enable the court to hold otherwise, the presumption was seized upon that from long acquiescence the relationship had been properly determined—a presumption rebuttable of course, but in this case not rebutted.

The assertion that long acquiescence is said to evidence the determination of the relationship of trustee and *cestui que trust* at the time of the transaction, is merely the application of the principle which is expounded in a number of cases of which the following are sufficiently representative. In *Ex parte Lacey* (o), Lord Eldon said, "The rule is this. A trustee, who is entrusted to sell and manage for others, undertakes, in the same moment in which he becomes a trustee, not to manage for the benefit and advantage of himself. It does not preclude a new contract with those who have entrusted him. It does not preclude him from bargaining that he will not longer act as a trustee." And at another place on the same page he says, "If a trustee will so deal with his *cestui que trust* that the amount of the transaction shakes off the obligation that attaches upon him as trustee, then he may buy."

And in *Sanderson v. Walker* (p), the same great authority says, "The principle has been laid down that a trustee for sale may be the purchaser in this sense, that he may contract with his *cestui que trust* that, with reference to the contract of purchase, they shall no longer stand in the relation of trustee and *cestui que trust*, and the trustee having through the medium of that sort of bargain, evidently, distinctly, and honestly, proved that he had removed himself from the character of trustee, his purchase may be sustained."

(o) 6 Ves. at p. 626.

(p) 13 Ves. 610.

In other words, he must cease to be trustee, or the confidence which had been placed in him must be withdrawn (q). Once he has determined his obligation to manage and sell for his late *cestui que trust*, he can no longer offend against the rule that he shall not buy from himself. Being no longer trustee he is no longer under an obligation not to purchase.

But he cannot qualify himself to purchase simply by retiring from the office of trustee with that object in view. In *Spring v. Pride* (r), Lord Justice Knight Bruce spoke of the retiring trustee as being "only colourably removed from the trusteeship, for the purpose of enabling a sale with more convenience, or with a better appearance, to be effected." The circumstances of the case were that the trustee had advanced moneys at various times to the husband of the lady whose property had been settled by the marriage settlement of which he was trustee. In pursuance of a prior arrangement, a deed was executed, substituting a new trustee for him, and on the same day a conveyance of the property was made to the retiring trustee in consideration of the former advances, and £100 additional. The *cestui que trust* acted without independent advice. Lord Justice Turner branded the transaction as "one of the most untenable sales that has ever appeared in this Court as between trustee and his *cestui que trust*."

And a purchase made after the *cestui que trust* has freed the trustee from his obligation will be jealously scrutinized by the Court, and must be free from all suspicion of fraud, concealment, or undue advantage on the part of the trustee. But in the absence of anything showing that the trustee has taken advantage of his former position as trustee to supplant the *cestui que trust* the Court will affirm the transaction (s). The trustee cannot go on up to the time of sale getting information about the property at his *cestui que trust's* expense, and then turn the information to his own

(q) *Gibson v. Jeyes*, 6 Ves. 270.

(r) 4 De G. & S. 395.

(s) See *Morse v. Royal*, 12 Ves. 355.

individual benefit. Still, if he has not so used that knowledge, but has disclosed all that he knew to his *cestui que trust*, and the *cestui que trust*, not being deceived, has agreed to sell, and has sold to the trustee, the trustee's conduct is not open to question.

A very remarkable case of the kind is *Hickley v. Hickley (t)*, a case which, as Bacon, V.C., said, was one of those cases as to the duties of trustees which strained the principles upon which the Court acts as severely as any he ever heard of. H. was surviving devisee in trust for sale under a will. He was to stand possessed of the proceeds of sale for the benefit of the testator's three daughters, one of whom was H.'s wife, and their issue; and, amongst other things, the trustee was to pay one-third of the proceeds to the trustees of the settlement of H. and his wife. One of the properties devised in trust for sale was the testator's dwelling-house, which H. and his wife were anxious to retain in the family, and reside in. They therefore requested the trustees of their settlement to purchase the place for that purpose, to which they acceded, but without themselves taking any active part in the proceedings which they left entirely in the hands of H. himself. H. was a solicitor, and had acted in that capacity to the testator's estate. He then appointed one Burnell, a surveyor, to act as the agent of the trustees of his settlement and to purchase the dwelling-house. He then appointed one Clark, an auctioneer, to sell the property and as a preliminary to fix the reserved bid. Clark valued the place at £6,000, and placed the reserved bid at that figure. H. deposed that his object in getting Clark to fix the reserved bid, was to secure the getting the best possible price; he was not sure whether he communicated the reserved bid to Burnell, but he thought it probable that he did do so. H. authorized Burnell to bid as high as £8,000 for the place. At the sale Burnell was declared the purchaser at the price of £7,230. This sum exceeded the funds in the hands of the trustees available for the purchase, and H. out of his own moneys made up the deficiency. About

(t) L. R. 2 Chy. Div. 190.

a year afterwards, a bill was filed by the infant children of one of the testator's daughters to have the sale declared not binding upon them.

It will have been noticed that H. had been solicitor for the testator's estate, was to some extent interested in the proceeds of sale of the realty, desired to purchase part of that realty for the purpose of a residence, appointed the auctioneer who made the valuation and fixed the reserved bid, appointed the agent to bid on behalf of the trustees, and, knowing the amount of the reserved price, instructed that agent to bid as high as £2,000 above it. He eventually secured the house at a less sum than the limit to which he was prepared to go, and which he therefore must have thought was the value of the property—at least under the circumstances.

It was argued that H. having told Burnell, the agent, to bid £8,000, he ought to have instructed the auctioneer to fix that sum as the reserve price. Knowing that there was in the market a purchaser willing to bid that amount, he did not give the estate the benefit of that knowledge, and the house sold for £7,230 only.

The Vice-Chancellor, in commenting upon the argument that H. had not discharged his duty, said, "The duty which, according to the argument, was imposed upon him was that, after he had made up his mind that it was worth the trustees' while to buy at any price four out of the five lots, if the fifth [the place in question] should be purchased for £8,000, it was his duty to have gone to the auctioneer and told him to alter his reserved bid, and put up the lot at £8,000. What authority is there for any such duty being cast upon a trustee? What authority, so far as Mr H.'s interests under the settlement were concerned, is there for saying that he was not justified in helping to acquire the property that was put up for sale? I know of none." And again, "Keeping in mind the strict rules which the Court has laid down respecting the conduct of trustees, or rather to insure the due discharge of the duties of trustees—acting with a sense of that implacable jealousy which the Court always feels and exercises in dealing with the conduct of

trustees, I cannot perceive in this case blame or wrong of any sort."

We have seen then that the rule is not so strict as that the relationship of trustee and *cestui que trust* must actually be severed, for instances occur in which, the relationship existing, the sale has been permitted. It is sufficient if the confidence which has been placed in the trustee be withdrawn, no advantage being taken by the trustee to procure the consent to withdrawal. If the relationship is not dissolved the parties must be put so much at arm's length that they agree to take the characters of purchaser and vendor, and then the inquiry is whether all the duties of these characters have been performed (*u*). Whether the parties can be so put at arm's length, pending the relationship, has, so far as we can find, not been doubted until the reversal in the Court of Appeal (*v*) of the decision by Proudfoot, V.C., of *Ricker v. Ricker* (*w*), which we shall presently notice. In fact, the manner of proceeding to this is specifically pointed out by Sir R. P. Arden, M.R., his Lordship giving in detail the necessary steps of bill filed, etc., in order to obtain the leave of the Court to buy (*x*). And in *Farmer v. Dean* (*y*), a trustee, on a bill filed for leave to purchase, was granted leave to buy at the sum at which the trust estate had been bid in at an abortive sale. Indeed, the learned editor of the last edition of *Snell's Equity* (*z*), referring to Lord Eldon's remarks in *Ex parte Lacey*, goes so far as to say, "And, in fact, the rule, as expressed by Lord Eldon in the words quoted above, would at the present day hold good (if at all) in the case only of a trustee *for sale* purchasing from his *cestui que trust* without the leave of the Court to bid."

In judicial sales, the rule is still adhered to, however, as a general one, that trustees and others occupying a fiduciary

(*u*) *Gibson v. Jeyes*. 6 Ves. 277.

(*v*) 7 App. R. 282.

(*w*) 27 Gr. 576.

(*x*) *Campbell v. Walker*, *supra*; and see *Boswell v. Coaks*, 23 Chy. Div. 304.

(*y*) 32 Beav. 327.

(*z*) At p. 469.

position are not allowed to bid. The reason usually given is that their being at the sale as bidders is a discouragement to others to bid (a). Lord Hatherley was pressed by the argument that the trustee's bidding would be an advantage to the sale, as the more bidders there were the better chance there would be of a good sale. But his Lordship answered, "On the other hand, the knowledge that the trustee was a bidder might keep others away, as they might consider that he would bid to the utmost value of the property, and then, if any one else bid more, would leave it" (b).

The Court will not, however, on principle, invariably refuse leave to the trustee to bid. The case cited in *Lewin on Trusts* (c) does not establish the contrary, namely, *Tennant v. Trenchard*, supra. Indeed, so much is implied from our G. O. 381, which declares that "all parties may bid without taking out an order for the purpose, except the party having the conduct of the sale, and except any trustees, agents, and other persons in a fiduciary situation." This order implies that with an order of Court such parties may bid; and the practice of making applications for such orders is not uncommon.

The granting or withholding of leave to bid depends, where the *cestui que trust* is *sui juris*, upon whether or not he consents to the order being made. He is entitled to decide for himself whether he will change the relationship of trustee and *cestui que trust* into that of purchaser and vendor (d). And, in *Tennant v. Trenchard*, supra, leave to bid was refused, not upon any rigid principle of the Court that the trustee shall not bid with its sanction, but for the express reason that the *cestuis que trustent*, or one of them, would not consent to his bidding. "The rule is," said Lord Hatherley (e), "that if those who are interested in the estate insist that a trustee ought not to be allowed to bid,

(a) *Ex parte Lacey*, 6 Ves. at p. 628; *Ex parte James*, 8 Ves. 348.

(b) *Tennant v. Trenchard*, L. R. 4 Chy. App. 547.

(c) 7th Ed. p. 443.

(d) *Ex parte James*, 8 Ves. 352.

(e) At p. 546.

the Court will certainly give so much weight to their wishes as to say that until all other ways of selling have failed he shall not be allowed to buy. But if the Court is satisfied that no purchaser at an adequate price can be found, then it is not impossible that the plaintiff may be allowed to make proposals to become the purchaser."

What is the effect upon the position of a trustee of allowing him to bid, was the subject of adjudication in *Ricker v. Ricker*, supra. As a matter of principle it can hardly be successfully argued that there is any difference between the effect of allowing a trustee to buy on bill filed for that purpose, and giving him leave to bid at a judicial sale. Where a sale has been carried out in pursuance of leave given on bill filed it would require either on the one hand evidence that the leave had been obtained by fraud or undue advantage, so as to induce the court to say that the relationship of trustee and *cestui que trust* had never been severed, or, on the other hand a case made out to the satisfaction of the Court that the relative duties of vendor and purchaser had been neglected or abused, as it was intimated in *Gibson v. Jeyes*, supra. The effect of all the cases is as we have seen that either the fiduciary relationship must be severed, or that the confidence placed in the trustee must be withdrawn and the parties placed at arm's length. How they may contract without severing the relationship has been pointed out in *Gibson v. Jeyes*, *Campbell v. Walker*, *Boswell v. Coaks* and *Farmer v. Dean* (f).

To say that where the parties being *sui juris*, have by contract properly severed the relationship and yet that the relationship continues or revives upon a sale to the trustee, is absurd. To say that the Court, upon bill filed, has given leave to the trustee to buy (no undue means having been taken to obtain the leave), only to set aside the sale again at the instance of the *cestui que trust*, is no less absurd. The doctrine of the Court is that if the parties have been placed at arm's length the trustee may safely buy; and a bill is filed for the express

(f) Supra.

purpose of putting the parties at arm's length in the face of the Court. The result of the cases is that the parties must throw off their character of trustee and *cestui que trust* and assume those of vendor and purchaser, and the leave of the Court is obtained for that purpose. The supposition in such a case is that the Court has investigated the circumstances and has found the case a proper one for giving the leave. If the facts have not been arrived at, the fault to some extent lies upon the *cestui que trust*. The case must be an extraordinary one in which the Court would set aside a sale which it had directed or allowed after an investigation of the circumstances. As we have suggested, no real difference exists between leave given on bill filed and leave given pending proceedings for a judicial sale. The difference is merely in form. In the latter case it must not be presumed that the Court would grant the leave without being satisfied of the propriety of the order, and once having been so satisfied, it should require a very extraordinary case to induce the Court to set aside the sale held pursuant to the leave.

In *Ricker v. Ricker* (g), by the decree made in the cause, leave had been given to the plaintiff, trustee, to bid; the conduct of the sale was given to the guardian *ad litem* of the infant *cestui que trust*; the trustee became the purchaser, and the Master so reported. On a petition subsequently presented to set aside the sale, Proudfoot, V.C., said, "when the decree gave the plaintiff liberty to bid at the sale, it put the parties at arm's length; it divested the plaintiff, so far as the sale was concerned, of any fiduciary relations he might have sustained to the infant; intrusted the conduct of the sale to the infant's guardian, and in effect placed the plaintiff in the position of an outside purchaser: *Lewin on Trusts*, 7th Ed. 443, and cases cited there. He is no longer responsible for the proper conduct of the sale; that is taken from him, and he can only be made to answer for fraud, collusion or perhaps error." His Lordship thought there was no such evidence of undervalue as to induce him to

(g) 27 Gr. at p. 589.

suspect fraud, and that fraud was not otherwise shown—in fact it was not charged in the petition—and the petition was dismissed.

This judgment was reversed on appeal (*h*). The judgment of the Court upon this particular point was delivered by Spragge, C. J. O., who, at page 287, said, “I may as well state here what I conceive to be the law applying to this case, and how the conduct of a party in the position of this plaintiff is to be regarded. Allowing him to bid at the sale was allowing him to place himself in a position where his interest was, or might be to some extent, in conflict with his duty; but it did not sink his character of a trustee under the will into that of a prospective purchaser, so that what would have been a breach of trust, if he had not been allowed to bid, was divested of that character because he was allowed to bid. It must be assumed that he was allowed to bid to protect his own interest as mortgagee and as devisee; but if he used that permission to prejudice the interest of his *cestui que trust* in order to benefit himself, it was an abuse of the permission granted. A stranger might do what he owed as a matter of duty to this defendant not to do.” And again, at page 290, his Lordship said, “I cannot myself doubt that his being a party to a suit for the purposes for which he filed his bill, and being allowed the privilege of bidding at the sale directed by the decree at his instance, did not absolve him one iota from the duty which, as trustee, he owed to the infant defendant.” And again, at the same page, “That privilege [the privilege to bid] does not *per se* carry with it anything beyond the bare permission to bid at the sale. It is not *necessary*, in order to the exercise of that privilege, that he should be absolved from any duty which, but for the granting of that privilege, was incumbent upon him; and certainly it is not a necessary implication from what was in terms granted, that his position should be different in any respect, in which it was not made different by the order which he obtained; and it is to be observed that the further change of position contended for

(*h*) 7 App. R. 282.

was a something for his own benefit, and which he might use to the prejudice of the infant; and this surely was not to be *implied*."

The result of this is, that, in his Lordship's opinion, the character of trustee was not changed into that of prospective purchaser; and that the leave to bid must be assumed to have been granted to the trustee to protect his own interests as mortgagee and devisee. To the last observation it may be answered, first, that where a trustee is not also an incumbrancer, and is accorded leave to bid, the argument does not apply at all, and therefore such leave when granted must be granted for some other reason than to protect the trustee's personal interests. And secondly, if he was accorded leave to bid to protect his own interests, he was recognized as having interests of his own to be protected, which were not the interests of his *cestui que trust*, and which he could not protect without the leave of the Court, by reason of being bound to do his best for his *cestui que trust*. And having got leave to bid it must mean that he was at liberty to protect his own interests, without being obliged to attend to the interests of the *cestui que trust* to whose guardian the conduct the sale had been intrusted. Every man who goes to a sale as a purchaser has interests to protect, so to speak. And if he acts selfishly in buying at as low a price as he can, who is to blame him? And that is contemplated by the Court when the leave is given to the trustee. It is for this very reason that Courts scrutinize with jealousy sales by trustees to themselves; but when the trustee first comes for leave to buy and obtains it, the Court gives the leave only after putting the interests in the *cestui que trust* under his own protection, if an adult, or that of a guardian, if not *sui juris*. Is it then intended that the *cestui que trust* is to have two persons attending to his interests at the sale?

As to the first holding of his Lordship that the character of the trustee was not sunk in that of prospective purchaser, if it depends upon the general rule that the trustee for sale shall not purchase from himself pending the relationship, it offends against the very rule by giving the trustee leave to

bid while he continues trustee. It places the trustee in a position where his duty and his interest conflict a position in which the Court will not, as a rule, allow a trustee to be placed. It is against the dictum of Lord Eldon in *Gibson v. Jeyes*, supra, who says that the parties must change the relationship of trustee and *cestui que trust* for that of purchaser and vendor, if a sale is to take place; and we cannot assume that the Court intends to let the trustee bid only to tell him afterwards that, as he always remained a trustee, the sale will be set aside at the election of the *cestui que trust*. If, as Sir Wm. Grant, M.R., said (i), "Acquiescence may have the same effect as original agreement," and original agreement would estop a *cestui que trust* from afterwards disputing such a sale, surely subsequent confirmation of a sale by a Court and prior acquiescence in the same should be of equal value, and if subsequent confirmation by the Court would assure the trustee in his position, prior acquiescence in his taking the position ought also to protect him.

Indeed the strongest expression of opinion against the judgment of the Court of Appeal is that given by his Lordship himself, when Chancellor, in *Mitchell v. Mitchell* (j) a somewhat similar case. This case was cited in *Ricker v. Ricker* to the Judge of first instance, and though not expressly mentioned in his judgment no doubt had its weight. His Lordship said, "The short point then is, whether a party allowed by order of the Court to bid at a sale, stands upon the same, or a different, footing from a stranger. The order of the Court is in order to remove an obstacle. It is deemed proper, for sufficient reasons, as I must assume, that, in a particular case, the rule against such a party bidding shall not be allowed to prevail; and his disability is in terms removed. Upon what ground is it that the Court should hold that the disability is only partially removed; that, notwithstanding the unqualified terms of the order, there is still a qualification of his right to bid? None is to be implied, and if there was to be any, it ought to have been expressed." And at page 233, his

(i) *Randall v. Errington*, 10 Ves. 426.

(j) 6 P. R. 232.

Lordship says, "The plain import, and I think the plain natural effect, of the order was to place the plaintiff upon the same footing as any other person bidding at the sale."

The fact that the plaintiff in *Ricker v. Ricker* had interests as mortgagee and devisee as well as trustee, might have been a reason for refusing him in the first place leave to bid. And so the matter was viewed in *Mitchell v. Mitchell*, the learned Chancellor asserting that, and saying that it would be illogical and unreasonable to give effect to such reasons after the plaintiff by leave had become purchaser.

Such a course was adopted in *Tennant v. Trenchard*, supra, where the trustee had become an incumbrancer by paying off charges upon the lands. The Court had refused him foreclosure and directed a sale. Lord Hatherley, L.C., on appeal rescinded an order granted to the trustee, plaintiff, giving him leave to bid, saying that the justice of the case required that he should not be allowed to buy until an attempt had been made to sell. Such might have been the proper course to pursue in *Ricker v. Ricker*, but leave having been granted it must be assumed that it was a proper case for such leave.

The most recent case is *Boswell v. Coaks* (k), and in that case Fry, J., did not call for argument in support of the view that the fiduciary relationship ceased after leave given to the trustee to bid.

His Lordship said, "It is said that the effect of leave to bid is, not to place a person who was in a fiduciary position at what is commonly called arm's length, and to put an end to that fiduciary position; but that it only varies the right of the *cestui que trust* to this extent, that whereas before the leave to bid, he could at his mere election have set aside the transaction, after the leave to bid is granted he is no longer at liberty to set it aside at his mere election, but is bound to prove that there was some non-disclosure of a material fact which the person permitted to bid was obliged to disclose. In other words, it is said that Mr. Coaks, having obtained this leave to bid, was still under his original obligation to disclose everything which it was material

(k) L. R. 23 Chy. Div. 302.

to the vendor to know, and that if that disclosure was not made the sale could be set aside; and that the effect of the leave to bid was to limit the right to set it aside to that particular contingency. In my judgment nothing could be more inconvenient than such a rule, or more at variance with the general principle of the Court. * * It is said here that Mr. Coaks, notwithstanding his liberty to bid, was bound to disclose everything which it would be material to the vendor to know. What would be the result of such a rule? It would amount to this: that Mr. Coaks having leave to bid, as he subsequently did, £40,000, would have been bound to disclose his own willingness, if such were the case, to give £41,000 or £42,000, and that he would have been bound to admit that if he were pressed a little harder more money would be forthcoming. It appears to me to be obvious that no transaction of bargain and sale could be reasonably conducted on any such principle as that, and if that were the meaning of giving leave to bid, I am bound to say that, in my opinion, no such leave to bid ever ought to be given. Is there any authority for the proposition which has been urged on behalf of his plaintiffs? It is admitted that there is none whatever." He then cites *Campbell v. Walker*, 5 Ves. 678, 681, where Lord Alvanley thought that such a person was divested of the character of trustee, and proceeds, "Though the passage is not perhaps quite so clear as it might be, it appears to me that Lord Alvanley considered that giving leave to bid prevented all the consequences of a person acting both for himself and for his *cestui que trust*. In other words, to use a common but forcible expression, it placed the trustee at arm's length with the estate, which it would be otherwise his duty to protect, and what applies to trustee and *cestui que trust* plainly applies to a solicitor who is acting in an action. That appears to me to be in this case really the crucial question, because, although it was faintly suggested that independently of fiduciary relationship, there was enough here to set the contract aside, the stress of the argument lay undoubtedly on the continued subsistence of the fiduciary relation, notwithstanding the liberty to bid."

EDITORIAL REVIEW.

Recent Manitoba Legislation.

We have had sent us copies of several enactments passed at the last session of the Manitoba Legislature.

The first to be noticed is an Act making certain amendments to the existing iniquity of the Mechanics' Lien Act. There is nothing peculiar about the details of the Act except that no lien exists for a less sum than \$20. There is little to justify the making an owner's property security for the indebtedness of an insolvent or dishonest contractor; and little in such an enactment to endear it to the workingman, giving to him as it does one of the most intricate and complicated remedies that can be conceived.

Complementary to this Act is an Act with the Utopian title of "An Act to secure the payment of builders and workmen." It is the only sensible enactment that we have seen on the subject in connection with Mechanics' Lien Acts. If the draughtsman had as much knowledge of grammar as he has sense, his Act would be much less difficult of construction than it evidently is fated to be. The gist of it, however, is as follows. Every contractor is to keep a pay sheet, and every payment to the men in his employ is to be "attested by the signature or cross of such workman or workmen in presence of a witness who shall also sign the same, and any proprietor may require the production of such pay list before the payment of any amount claimed to be due on such work, except by the order of a Court."

On every Saturday or within three days thereafter any unpaid workman may deliver to the proprietor his claim in duplicate in presence of a witness, and from the time of the delivery the contract price shall be attached up to the

amount of the claim. Payments made thereafter to the contractor do not affect the workman's right to sue the proprietor for the amount attached.

Payment to any workman under order of a Court shall be equivalent to payment to the contractor.

A most important enactment is that intended to make municipal debentures an indefeasible security. The Act provides that after a by-law for the issue of debentures shall have been passed, the clerk of the municipality may transmit a certified copy to the judge of the County Court of the district within which the municipality lies, with proof that all the requirements of the law have been complied with. Public notice is then to be given of a proposed application to the judge for a certificate that the by-law has been properly passed. Any ratepayer may then offer evidence as to the non-compliance of the municipality with the requirements of the law, or as to undue influence having been used to secure the passage of the by-law. If the judge is satisfied that the by-law has been properly and legally passed he certifies the same to the municipality, and transmits a certified copy of the by-law to the Provincial Secretary, who at any time within six months, upon the application of the municipality endorses a certificate on the debentures under the Seal of the Province, setting out the financial condition of the municipality. This endorsement renders the debenture "an absolute and indefeasible security to the lawful holder thereof, for the amount of such debenture and interest, if any, payable thereon, as against the municipality issuing the same," is absolute proof that the by-law has been legally passed, and prevents the municipality or any ratepayer from questioning the validity thereof in any Court in the Province.

If the judge is not satisfied that the by-law has been properly passed he shall refuse his certificate reporting his reasons to the municipality. "And the said by-law and the debentures that may be issued thereunder, if any, shall thereafter be in the same position as if the provisions of the Act allowing such reference to the judge had not been passed."

Fio at Justitia !

The following is a true copy of an information now on file in a certain County of Ontario :—

“ The Information and Complaint of C. H. of the Township of H. in the County of H. Lady taken this 13 day of January In the year of our Lourd one Thousand eight Hundred and Eighty Three Before The undersigned one of her Majesty's Justices of the Peace in and for the said county of H. who Saith That T. M. of the villiage of H. Tailor did one evening in or About Five months Past Forcibly and voilintly take her into an old House in the said villiage of H. and abuse her Person and from such abuse she Says she is Ruined for life and then Seduced Her by Promising to Marry her and Got her with child and wont Marry her acord- ing to Promise

her
C. X H.
mark

Sworn before me the day and year First above mentioned at my House

W. F., J.P.”

And the following is the substance of the warrant thereon :—

“ For that T. M. of the villiage of H. did about Five Months Past seduce C. H. by Promising to mary her and got her with child and wont mary her according to Promise.

* * * * *

Given * * * at my House in the county of H. aforesaid.

W. F., J.P.”

Dignity v. Convenience.

The Master's office is a place where, of all places in Osgoode Hall, it could have been said that

“ Works without show, and without pomp presides.”

However, those who have remained in town during vacation and have paid occasional visits to the Hall, have seen

its splendours gradually rise under the "pressure of contiguous pride," until now it shines forth "in all the glaring impotence of dress."

The broad and useful table, at the head of which the late Master used to sit, and over whose accommodating surface heaps of papers used to be strewn by the solicitors engaged in the references, has been replaced by rows of things that bear a striking resemblance to second-hand pews. There is no accommodation of any sort for papers, and it is simple truth to say that the cramped seats and narrow ledges form the greatest material obstruction to business that could be devised.

If the Master's office were a Court room, the dais which has been erected for the Master would be proper enough—so would the witness box. But, as it is not a Court room, that extraordinary structure only aids the inappropriate seats in imparting a pretentious air to the whole room.

Before any business can be transacted before the Master, the seats will have to be removed and the broad table restored, and, therefore, the sooner it is done the better.

Privy Council Appeals.

In *Canada Central Railway Co. v. Murray*, L. R. 8 App. Ca. 574, the Judicial Committee of the Privy Council have again determined that they will not give leave to appeal where the issue is one of fact only.

An important point of practice is also settled which intending appellants will do well to observe. Lord Watson, in delivering the judgment of the Board, says, "Their Lordships are also desirous in this case to lay down the rule that they will in future expect parties who are petitioning for leave to bring an appeal before this Board to state succinctly, but fully, in their petition, the grounds upon which they made that demand. They certainly expect that parties will confine themselves in future to the petition, and will not wander into extraneous matter, such as the record and proceedings, over which this Board, until an appeal is permitted and the papers are sent to England by

the proper authorities, have no control, and which they cannot accept on an *ex parte* statement, which an application of this kind is."

Would you be surprised to learn

That the Lord Chief Justice of England is not coming to Canada at all, notwithstanding his acceptance of our invitation? The cause is, too many engagements made by his Lordship's American hosts.

There is nothing left to be done now but to put on the best face and pay the bills.

The only men who can really look back on their committee labour without regret, are the wine committee, the members of which met with regularity, frequency, and hilarity, and seemed to have great difficulty in making their selections.

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BOOK REVIEWS.

The Law and Practice of Discovery in the Supreme Court of Justice, with an appendix of forms, orders, etc., by CLARENCE JOHN PEILE, of the Inner Temple, Barrister-at-Law. London: Stevens & Haynes, 1883.

Though the book savours of Discovery, the title page savours of Invention. Either that is so, or else we have not before been apprised of the change in the name of the Supreme Court of Judicature. Our author's denomination of the Supreme Court is repeated in the text, and tends to prejudice one against the work. The book is concise, and the learned writer contents himself with shortly stating the results of the numerous authorities which he cites.

The Consolidated Municipal Act, 1883, with Index, by GEORGE BELL, of Osgoode Hall, Barrister-at-Law. Toronto: Hart & Company.

A good index is a good thing; and as far as we can see Mr. Bell's index to the Municipal Act is a good one. By reason of the large and varied powers of municipalities, their affairs attract no little attention, and therefore entail a constant reference to the Act. Mr. Bell's publication puts the Act in a handy form, and furnishes an index which makes it useful for ready reference. We hope the book will have a large sale.

CORRESPONDENCE.

Official Titles.

To the Editor of the Canadian Law Times :

Sir,—It is hardly to be wondered at that there is some degree of haziness as to the proper designation of officials under *The Judicature Act*. One would have imagined however that the officers of the court at least would by this time have learned the proper titles of themselves and their fellow officers. At the same time there is high authority for this apparent forgetfulness or indifference to the fact that all things have been made new. In the Queen's Bench Division, the learned Judges constantly talk about the "Court of Chancery," as though it had never been merged in the Chancery Division of the High Court of Justice, and as though "its sweetness and light" had not been equitably divided between the various Divisions of the High Court. I am moved to these reflections by a perusal of the last number of the Ontario Reports, in which I find an announcement of a forthcoming work by my learned friend, Mr. Lefroy, who styles himself "Reporter for the Chancery Division of the Supreme Court of Judicature for Ontario." Now the Chancery Division is not a Division of the Supreme Court, but a Division of the High Court of Justice. The High Court of Justice, and the Court of Appeal, are the only two Divisions of the Supreme Court; Judicature Act, sec. 3, s-s. 2. Proceeding a little further we find, on page 499, a recital of an order, which must have issued under the supervision of some officer of the court, from which it appears that a case was referred to "the certificate of Samuel S. Lazier, Master of the Chancery Division at Picton;" whereas Mr. Lazier, by sec. 58, s-s. 2, of the Judicature Act, is constituted an officer of the Supreme Court, and his proper title is therefore "Master of the Supreme Court of Judicature for Ontario at Picton," and

not Master of the Chancery, or any other, Division of the High Court.

Still a little further on and we find at page 562 a statement that a Master's report was affirmed by "Proudfoot, V.C.," and that a learned counsel moved to reverse the decision of "Proudfoot, V.C." Considering that the decision appealed from was pronounced on 22nd February, 1882, it is quite clear that it was Mr. Justice Proudfoot and not Mr. Vice-Chancellor Proudfoot, who is the Judge intended to be referred to. The learned reporter of the Common Pleas Division, we fear, is oblivious of the fact that the title of Vice-Chancellor was abolished by the Judicature Act, sec 3, s-s. 3.

Yours, &c.

[Perhaps the learned reporter's appellation of Mr. Justice Proudfoot is due to his prophetic soul, which sees in 1892 (the year in which he places the argument of the case in his report) a return to the old style.

The *West Huron Election Case* in the Supreme Court will perhaps throw some light on the other points, since, after all, it appears that the old courts still exist, the ponderous strength of the Legislature having been spent on a change of name only—like setting a locomotive to catch a butterfly.

ED. C. L. T.]

REVIEW OF EXCHANGES.

Albany Law Journal—7th April, 1883.

Common Words and Phrases. More or less; detached at least one hundred feet; lying at anchor; money; roll; team; stack of corn; unmarried; due; storing or keeping; cabinet ware; prepared; forthwith; bucks; corn; boulevard—drive—park; garden; janitor; tool; are defined.

Ibid.—14th April, 1883.

Municipal Ordinances. A collection of American cases. In *City of Jackson v. Newman*, 59 Miss. 385, it was held that the exaction of \$40 a year for a license for hack driving is invalid under police power. The court said, "The ordinances under which the collections were made from the appellee were clearly intended as means for raising revenue, and it is apparent that the fees required were not for the purpose of paying the cost of the labour and material in issuing the license."

Ibid.—21st April, 1883.

Common Words and Phrases. Imported; inspection; building; external, violent, and accidental means; live stock running at large; maladministration—misadministration; manufacture; remainder of the little property; use; are defined.

Ibid.—28th April, 1883.

Club Law—Particularly as to rights of expulsion and liability of members, by LOUIS CLAUDE WHITON. A review of the English and American cases under the following heads: I. What is a social club? II. The power of the majority to bind the minority. III. The rights of members. (a) Property rights. (b) Personal rights, expulsion. IV. The liability of members.

Ibid.—19th May, 1883.

Common Words and Phrases. Chickens; improper liberties; cruel and unusual punishment; brutal; to become due; along; pool-selling; borrow; saloon; are defined.

Ibid.—2nd June, 1883.

Abatement of Private Nuisance. As a general rule a person who is injured by a private nuisance may abate it; but he can only remove so much of it as constitutes the nuisance; and if there are two ways of

abating the nuisance, the injured party must choose the less mischievous. To justify the abating, the thing must have been a nuisance at the time. This remedy is limited to cases of particular emergency, requiring a speedy remedy, and must be exercised within a reasonable time, and with the least practicable injury. The exercise of the remedy must have no tendency to a breach of the peace. So one may not demolish a dwelling-house actually inhabited at the time, although it is a nuisance. English and American cases are cited.

Ibid.—9th June, 1883.

Common Words and Phrases. Require—may ; obvious danger ; seaman ; lottery ; insolvency ; gone East ; fairly merchantable ; abandoned ; lost ; measure from ; seize ; device ; embezzle ; manual labour ; ecclesiastical purposes ; issue—children ; common school ; are defined.

Ibid.—16th June, 1883.

Evidence of Custom to Explain Contract. American cases as cited to show that usage may control the ordinary significations of words or phrases in trade. The substance of the cases is that the parties must have been contracting with reference to certain facts known to the trades and therefore incorporated in the contract.

Ibid.—23rd June, 1883.

Independence of Married Women. Two cases are commented upon. The first was one in which it was decided that a woman might devise to her husband on condition that he would not marry again. The other was upon a statute providing that the loser of money at cards, or any creditor, might recover it by action within a certain time, and after that time, "any other person" might recover treble the amount. Held, that the loser's wife was such "other person."

Ibid.—30th June, 1883.

Common Words and Phrases. Regular passenger train ; locomotive engine ; speed ; front part ; assigns ; trial ; premises ; cribs ; wharfage ; are defined.

Defaulting Purchaser at Judicial Sale, by JOSEPH C. LEVI. American cases are cited. The conclusions arrived at are not in harmony with English law.

American Law Register.—May, 1883.

Extra-Territorial Jurisdiction of Receivers, by ADELBERT HAMILTON. After a review of the cases, the learned writer sums up as follows:—"Any court having jurisdiction of a debtor, may appoint a receiver of his property, including as well that property which is without, as that which is within the jurisdiction of such court. Property within the jurisdiction of the appointing court passes by the appointment *per se*

to the receiver who may assert his rights thereto as receiver either in the court which appoints him or any other court, foreign or domestic. Property outside of the jurisdiction of the appointing court passes by the appointment *per se* to the receiver, as against the debtor and his privies to the appointment, but not as against creditors of the debtor residing in the foreign jurisdiction where the property is situate. Courts of such foreign jurisdiction will protect the rights of their own creditors to the property of the debtor, that is, within their jurisdiction, as against the receivers appointed by another court. Where a receiver has once obtained rightful possession of the property he was appointed to take charge of, he will not be deprived of its possession, except by the court appointing him, even though he remove with it to a foreign jurisdiction. While there it can not be taken by creditors of the insolvent who reside within that jurisdiction."

Ibid.—June, 1883.

Survival of Actions, by JOHN D. LAWSON. "The maxim *actio personalis moritur cum persona*, as a general principle, is not correct; it is confined generally to those cases which arise *ex delicto*, and not *ex contractu*, and even then, as we shall show, is subject to many restrictions, some the work of courts, some the work of legislators. There are actions *ex contractu* which do not survive, and there are actions *ex delicto* which do survive. * * The distinction seems to be between causes of action, which affect the estate, and those which affect the person only; the former survive for or against the executors, the latter die with the person." The English and American cases are fully reviewed, and statutes of both countries are examined. Where the damage consists of personal suffering only, an action on the contract does not survive, as in breach of promise of marriage.

American Law Review.—January—February, 1883.

The Limited Liability of Ship-Owners for Master's Faults, by HARRINGTON PUTNAM. A very good review of different systems of modern law affecting the subject.

Proof of Handwriting—By Comparison, by JOHN D. LAWSON. Comparison of handwriting should be confined to the examination of papers brought at the time into juxtaposition. The learned writer reviews the English cases in which the balance of authority seemed to be against the admissibility of evidence by comparison. The English statute permitting comparison by witnesses is cited. The laws of the various American States are then stated.

Recent Legislation as to Employer's Liability—Railroad Companies Liable for Injuries to their Employees, by ARTHUR B. ELLIS. The common law of England and some of the States is stated. The cases under the employer's liability Act are then noted. The statutory laws of several States are discussed.

Agreement for Separation Between Husband and Wife, by CHARLES A. MCMAHON. The subject is discussed under 1. The parties and the consideration. 2. Validity of covenants. As to this both English and American law have changed, the early cases denying the legal force of such an agreement, while the late authorities sustain it. "The English doctrine is now fully settled and admits these contracts to be perfectly valid and enforceable in all their provisions, with the exception of an agreement to refrain from bringing an action for restitution of conjugal rights, which in the mind of one authority, at least, is, as we have seen, doubtful."

The Elements Distinguishing the Successful from the Ordinary Legal Practitioner, and What they Suggest, by JOEL PRENTISS BISHOP. Some very useful and very practical advice to young men engaging in or about to engage in the profession of the law—and perhaps to some older ones.

Ibid.—March—April, 1883.

Jurisdiction Over the Estates of the Dead, by JAMES SCHOULER. Domicile with respect to the granting of Probate is first discussed; the subject of jurisdiction is then treated at large.

Marriage and Its Prohibitions, by HUGH WEIGHTMAN. *Thorp v. Thorp*, lately decided by the New York Court of Appeals, forms the text. Tracy, J., in asserting that the validity of a marriage is to be determined by the law of the State where it was entered into, and that being valid, then is valid everywhere, qualified his assertion. He said, "If valid there, it is to be recognized as such in the Courts of this State, unless contrary to the prohibitions of natural law or the express prohibition of a statute." The learned writer denies any "prohibitions of natural law," and places all prohibitions upon the artificial basis of public policy. Instead of being prohibitions of nature they are restrictions of nature. The leading cases are then discussed, and the learned writer concludes: "1. That while the *lex loci* governs the questions of form as ceremony, the *lex domicilii* determines the capacity of the parties to enter into the marriage contract, whereupon to found a *status* to be executed at home. 2. That, where the domicile of the contracting parties is different, the *lex domicilii* will decide in favour of its own citizen. And *e converso*, where the marriage is forbidden by the *lex domicilii*, the disability will be insisted upon by the Court of the *lex domicilii* of its own citizen, though inoperative in the *lex loci*."

Property Relations of Religious Societies, by JAMES M. GRANT.

Priority of Demands against Decedents' Estates, by J. G. WOERNER.

Central Law Journal.—20th April, 1883.

Illegal Contracts, by ISAAC N. PAYNE. Contracts of wager and Sunday contracts are chiefly discussed.

A Rationale of the Law of Costs, by WARREN WATSON. The history of the growth of the law which awarded costs to a successful litigant, with references to statutes.

Ibid.—27th April, 1883.

The Right of a Bona Fide Occupant of Land to Compensation for his Improvements, by HENRY WADE ROGERS. The rule of the Common Law is stated, followed by the Equity doctrine. Reference is made to statutes providing for compensation, and doubts raised as to their constitutionality.

Right of a Party When his Own Witness has Made Previous Contradictory Statements, by W. A. ALDERSON. The English rule before the Common Law Procedure Act is stated; then the American law. In the latter a distinction is made between cases when a party voluntarily calls a witness and those where he is compellable to call a particular person as witness. In the latter case he is not the party's witness.

Ibid.—4th May, 1883.

Doctrines of Descriptio Personae as Applied to Bills and Notes, by W. F. ELLIOTT. The learned writer enunciates the following propositions:—Where an agent merely adds descriptive words to his signature, he is personally liable. Where the name of the principal is disclosed in the body of the note and is signed by an agent, but no descriptive words are appended to his signature, it is the contract of him who signs it, unless there are apt words to show another intention. Where there are descriptive words showing the principal in both body and signature there is an inclination to hold the principal liable.

Fence Law, by EDMUND P. KENDRICK. The common law of England is stated. The variations of the common law in the different American States are set out. See *Crowe v. Steeper*, 1 C. L. T. 380; 46 U. C. R. 87 and cases there cited.

Ibid.—18th May, 1883.

Some Points of International Law, by FRANCIS WHARTON. The learned writer thinks it an indictable offence at common law to manufacture and keep in possession instruments that can only be used for an unlawful purpose. So, the manufacturers of dynamite so prepared and packed as to be used clandestinely should be prosecuted. Only the state in which the dynamite is used to kill could have jurisdiction. The question of extraditing such offenders is then discussed. The Trent case is then reviewed. The right of search is not to be exercised in time of peace. Belligerents have a right to search neutral merchant ships in time of war, the right being dependent on the actual pending of the war. But no neutral ship should be searched on its way between two neutral ports. The right could be exercised within the territorial waters of a neutral state. It must be based on probable cause. Contraband persons or

things cannot be seized but the vessel should be taken to a prize court where the question of contraband is to be determined. The right is not to be extended to neutral ships sailing under convoy of a man-of-war of the same waters. Envoys accredited by a belligerent state to a neutral state are not contraband, though the independency of the belligerent has not been recognized by the neutral.

Ibid.—25th May, 1883.

Equities and Defences Under Irregular Indorsements, by A. J. HIRSCHL. A review of the American cases.

Publication and Acknowledgement of Wills Under the Statute of Frauds, by JAMES SCHOONMAKER. English and American cases are cited.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Supreme Court of Canada.

ONTARIO.]

In re WEST HURON ELECTION CASE.

*Dominion Controverted Election—Ontario Judicature Act, 1881—Effect of
—Presentation of petition.*

The petition was entitled in the High Court of Justice, Queen's Bench Division, and was presented to the official in charge of the office of the Queen's Bench Division, and there filed and entered in the books of that office. The official was the former official occupying a similar position in the former Court of Queen's Bench, and this office had been the office of that Court. A preliminary objection was taken that the High Court of Justice had no jurisdiction.

Held, reversing the judgment of Cameron, J., 1 Ont. R. 433; 2 C. L. T. 590, that the Ontario Judicature Act, 1881, makes the High Court of Justice and its Divisions a continuation of the former Courts merged in it, and that those Courts still exist under new names, and that the petition having been filed in the proper office the erroneous entitling thereof should not defeat it.

McCarthy, Q.C., for the appellant.

Robinson, Q.C., and *Lash, Q.C.*, for the respondent.

ANDERSON v. JELLETT.

Ferry—License to ferry—Construction of—Disturbance of right.

Held, affirming the decision of the Court of Appeal, upon the facts stated, 2 C. L. T. 395; 7 App. R. 341, that the grant was a sufficient grant of a right of ferriage from shore to shore. But,

Held, reversing the decision, that the establishment and user of the plaintiff's ferry within the limits mentioned for a number of years had fixed the termini of the ferry, and, the termini of the defendant's ferry being two miles distant from those of the plaintiff's ferry, there had been no interference with or infringement of the plaintiff's rights.

James Bethune, Q.C., for the appellant.

Robinson, Q.C., for the respondent.

McDONALD v. FORRESTAL.

Sale of goods—Property in vendor till payment—Title of purchaser from vendee.

The plaintiff consigned goods to A. on the express agreement that the property therein should not pass until certain payments were made upon account. Without making such payments, and without the plaintiff's knowledge, A. sold the goods to the defendant.

Held, affirming the judgment of the Court of Appeal, that although the defendants were purchasers for value from A. in the belief that he was the owner of the goods, the plaintiff, having retained the property in them, and having done nothing to estop him from asserting his ownership, was entitled to recover their value from the defendant.

Gibbons, for the appellant.

Street, for the respondent.

McRAE v. WHITE.

Insolvent Act of 1875—Unjust preference—Presumption of fraud.

The judgment of the Court of Appeal, 7 App. R. 103; 2 C. L. T. 209, was affirmed.

Robinson, Q.C., and *J. H. Macdonald*, for the appellant.

Gibbons, for the respondent.

QUEBEC.]

REED v. MOUSSEAU.

Constitutional law—Tax upon filings in Court—Indirect tax—Jurisdiction of Provincial Legislature—43 & 44 Vict. cap. 9, sec. 9 (Que.)

By the Act, 43 & 44 Vict. cap. 9, sec. 9, it is enacted that "A duty of ten cents shall be imposed, levied, and collected on each promissory note, receipt, bill of particulars, and exhibit whatsoever, produced and filed before the Superior Court, the Circuit Court, or the Magistrates' Court, such duties payable in stamps." The Act is declared to be an amendment and extension of the Act, 27 & 28 Vict. cap. 5, "An Act for the collection by means of stamps, of fees of office, dues and duties, payable to the Crown upon law proceedings and registrations." By section 3, s.s. 2, the duties levied are to be "deemed to be payable to the Crown." The appellant obtained a rule nisi against the prothonotaries of the Superior Court of Montreal for contempt in refusing to receive and file an exhibit unaccompanied by a stamp as required by the Act. Upon the return of the rule the Attorney-General for the Province obtained leave to intervene and show cause.

Held, reversing the judgment of the Queen's Bench, Strong and Taschereau, JJ., dissenting, that the Act imposing the tax in question was *ultra vires*, the tax being an indirect tax raised to form part of the Consolidated Revenue fund of the Province for general purposes.

Per Strong and Taschereau, JJ. Although the duty is an indirect tax, yet, under secs. 65, 126 and 129 of the B. N. A. Act, the Provincial Legislature had power to impose it.

MacLaren, Q.C., for the appeal.

Lacoste, Q.C., contra.

ONTARIO.

Supreme Court of Judicature,

COURT OF APPEAL.

C. P. D.]

[29TH JUNE, 1883.

ROSENBURGER v. GRAND TRUNK RAILWAY CO.

Railway—Accident from fright.

The judgment of the Court below, 2 C. L. T. 349; 31 C. P. 349, was affirmed, Burton, J. A., dissenting.

Bethune, Q.C., for the appellants.

Bowlby, for the respondents.

RUSSELL v. CANADA LIFE ASSURANCE CO.

Life insurance—Warranty—Independent inquiries by Company.

The defendants' manager, being doubtful about accepting A. R.'s application for a risk on his life, caused the Company's local agent to make further enquiries as to A. R. On receiving a satisfactory report from the agent, a policy was issued.

Held, that the defendants were not thereby precluded from relying upon the written application of A. R., and showing that it contained wilfully untrue representations whereby the policy was avoided.

The judgment of the Court below, 32 C. P. 256; 2 C. L. T. 200, affirmed.

Bethune, Q.C., and *McTavish*, for the appellant.

McCarthy, Q.C., and *A. Bruce*, for the respondents.

MACNAMARA v. McLAY.

Fees of Registrars—Right of public to inspect abstract index.

The plaintiff sued for alleged overcharges made by the defendant, a Registrar.

The plaintiff required the Registrar, 1. To search the registry books and indices in his office. 2. To inform him of the name of the grantee of the last executed deed affecting a lot. 3. To inform him what incumbrances, if any, appeared in the books affecting the title. There were twenty-eight entries on the abstract index, and the Registrar charged \$1.45, being at the rate of 25c. for the first four entries, and 5c. for every other entry.

Held, that though the Registrar was not bound to undertake the task of discovering which was the last executed deed and saying whether there were existing incumbrances, yet having done so, he was entitled to the amount charged.

The plaintiff told the Registrar that J. B. owned a lot, whose number he was ignorant of, in the Township of B., and he required him to tell him what, if any incumbrances, affected the lot.

Held, that the amount charged by the Registrar was not an overcharge, viz., for searching the alphabetical index to ascertain the number of the lot, 25c., and for searching abstract index for incumbrances, 25c.

The plaintiff desired to see an original registered instrument, telling the Registrar the names of the parties and the lands comprised therein, but being unable to tell him the number of the instrument. The Registrar searched in the abstract index for the number for which he charged 25c., and for producing the original instrument, 10c.

Held, correct.

The Registrar was asked to exhibit the abstract index of a lot on being tendered 25c. therefor. The index contained 180 entries referring to the lot, and the Registrar demanded \$2 for a general search.

Held, Burton, J.A., dissenting, that there was an overcharge of \$1.75.

The Registrar charged \$2.05 for an abstract of five folios, being \$1.20 for searches, and the remainder made up at the correct rate per folio.

Held, correct, though the Registrar merely copied it from the abstract index.

Held, that in preparing an abstract the Registrar is not bound to rely on the correctness of the abstract index, but may lawfully test its correctness by making all searches necessary for the purposes of the abstract, but he may rely on the abstract index if he think fit, and is then entitled to the same fees as when he makes the searches. Where, however, he is asked for and gives a certified copy of the abstract index only, he is only entitled to the rate per folio.

Per Burton, J.A. The Registrar is the proper person to make searches, and he is bound to produce for inspection the original instruments and the books containing copies thereof only, and not the abstract index.

Per Patterson, J.A. The right exists in any person interested in any lot of land to see the abstract index of that lot for the purpose of a search, the abstract index book being one of the books which the Registrar is bound to exhibit within the meaning section 23 of the Registry Act.

The defendant in person for the appeal.

W. H. P. Clement, contra.

SPRAGGE, C.]

FLEMING v. McNABB.

Assessment and taxes—Invalid assessment—Tax sale—Purchase by Agent.

The plaintiff's land was assessed as lot 57, containing 87 acres. This embraced about seven acres which had been sold, and which was separately assessed. The assessor was aware of this. The defendant bought the land at a sale for arrears of taxes so assessed, and this suit was commenced within two years from the time of sale.

Held, affirming the judgment of the Court below, that the assessment was invalid and vitiated the sale to the defendant.

For several years the defendant had acted as the plaintiff's agent in paying taxes on the land; he also dealt with the tenants, and made alterations in the leases. At one time the plaintiff wrote to H. to attend to the taxes, who employed the defendant to pay them, which he did, sending the receipt to H. Subsequently the defendant proposed to find a purchaser for the plaintiff for a commission to be paid by him, though the land had been placed in the hands of an estate agent for sale. Nothing occurred to alter the relationship between the plaintiff and defendant up to the time of the tax sale, and the defendant did nothing during that time.

Per Burton, J. A. The confidential relationship between the plaintiff and defendant was determined by the employment of H. to do what the defendant had before attended to, namely, the payment of taxes.

Per Proudfoot, J. Nothing had occurred to determine the relationship between the parties, and the defendant was therefore disqualified as a purchaser to the plaintiff's prejudice.

Robinson, Q.C., and O'Connor, for the appellant.

S. H. Blake, Q.C., and Hall, for the respondent.

POWELL v. PECK—PECK v. POWELL.*Patent—Sale of—Right of renewal.*

The judgment of the Court below, 26 Gr. 322 was reversed upon the evidence, Patterson, J.A., dissenting, the Court being of opinion from Peck's conduct both before and after the expiring of the then term of the patent, that Peck knew that he was buying of Powell the patent for the then unexpired term only, and that Powell did not represent that the patent had ten years to run.

Powell assigned his interest in the patent and "all the right, title, and interest which he had in the said invention or secured to him by said letter patent," *habendum* "to the full end of the term for which the said letters patent are granted as fully and entirely as the same would have been held and enjoyed by me had this grant and sale not been made."

Per Patterson, J.A. This assignment did not restrict the grant to the then unexpired term so as to exclude the grantee from the right of renewal; but, on the contrary the grantee being the holder at the time of the expiry of the term was entitled to the renewal under 32-33 Vict. cap. 11, sec. 17.

Per Osler, J. The wording of the assignment limited the interest assigned to the then existing term of the patent.

Moss and Black, for the appellant.

S. H. Blake, Q.C., and *W. Fitzgerald*, for the respondent.

BOYD, C.]

LOWSON v. THE CANADA FARMERS' MUTUAL INSURANCE COMPANY.

Mutual Insurance Company—Proprietary policy—Judgment—Immediate execution—Enforcing judgment in appeal.

Held, reversing the decision of the Chancellor, 9 P. R. 185, that R. S. O. cap. 161, sec. 61, respecting Mutual Insurance Companies, which enacts that no execution shall issue against such a Company upon any judgment until after the expiration of three months from the recovery thereof, does not apply to a judgment recovered on a policy issued by the defendants on the cash principle.

Lount v. Canada Farmers' Mut. Ins. Co., 8 P. R. 433, over-ruled.

The proper way of enforcing the judgment of the Court of Appeal is to have the judgment of the High Court amended, if necessary, by the proper officer, according to the certificate of the judgment in appeal, and to issue process on the judgment as corrected.

Cattanach, for the appellant.

BLAKE, V.C.]

DIRECT CABLE CO. v. DOMINION TELEGRAPH CO.

Arbitration and award—Appointment of arbitrator—Neglect or refusal to act.

The judgment of the Court below, 1 C. L. T. 331; 28 Gr. 648. was affirmed.

Crooks, Q.C., and *Bethune, Q.C.*, for appellant Company.

H. Cameron, Q.C., for Sampson and Buckly, appellants.

Robinson, Q.C., *McCarthy, Q.C.*, and *Rae*, for respondents.

PROUDFOOT, J.]

MARTIN v. McALPINE.

Cognovit—Collusion—Remedy against colluding creditors.

The plaintiff was suing F., who was in insolvent circumstances, when the defendant also a creditor of F. approached him and induced him, by a promise to give time, to give him a cognovit whereby he obtained priority over the plaintiff. Both parties placed writs in the sheriff's hands. Under the defendant's writ the goods of F. were sold, the defendant buying part, the price of which he retained on account of his judgment, receiving the balance from the sheriff.

Held, reversing the judgment of the Court below, 2 C. L. T. 352, that the cognovit was collusive and void under R. S. O. cap. 118, sec. 1, and that the money realized by the sheriff was properly applicable to the plaintiff's writ.

Held, also that a judgment for payment by the defendant to the plaintiff of the proceeds of the sale could properly be made in this action.

Moss, Q.C., for the appellant.

S. H. Blake, Q.C., for the respondent.

C. C. BRUCE.]

DRISCOLL v. GREEN.

Chattel mortgage—Affidavit—Surplusage.

A chattel mortgage, dated 22nd November, 1881, was made to the plaintiff to secure him against the endorsement of the mortgagor's note, dated 4th October, 1881, at two months. The mortgage recited that it had been given "as security to the mortgagee against his endorsement of said note, or any renewal thereof that shall not extend the liability of the mortgagee beyond one year from the date hereof, and against any loss that may be sustained by him by reason of such endorsement of said note or any renewal thereof." The mortgagee's affidavit stated that the mortgage was made "for the express purpose of securing the mortgagee against the payment of the amount of such his liability for the said mortgagor by reason of the promissory note therein recited, or any future note or notes which he may indorse for the accommodation of the mortgagor, whether as renewals of the said note or otherwise."

Held, reversing the decision of the Court below, that, the mortgage itself being good, and the affidavit covering all that is required by the statute, that part of the affidavit from the word "or any future note" to the end was nugatory as far as creditors were concerned and did not vitiate the security.

H. J. Scott, for the appellant.

Gibbons, for the respondent.

Co. J., RENFREW.]

*In re MACDOUGALL.**Insolvent Act of 1875—Surplus—Interest on claims.*

The estate of an insolvent, under the Insolvent Act of 1875, paid 100 cents in the dollar, and the creditors claimed interest on their claims out of the surplus in the hands of the assignee.

Held, reversing the decision of the Court below, that, under section 99 of the Act, which declares that the balance shall be paid over to the insolvent "after the payment in full of all debts due by the insolvent," interest was payable in all cases where it was originally payable as part of the debt by contract or otherwise, but not in cases where it was claimable by law as damages only.

Gormully, for the appellant.

Bethune, Q.C., for the respondent.

C. C. WENTWORTH.]

LASH v. MERIDEN CO.

Master and servant—Wrongful dismissal.

The plaintiff was employed by the defendants as bookkeeper, and an assistant bookkeeper was placed in charge of the books, who told him, without cause, that he was no longer required; whereupon the plaintiff left, engaging himself in other work under protest. A verdict was entered for the plaintiff, and a rule for a new trial refused.

Held, affirming the judgment of the Court below, that the defendants' action was equivalent to a wrongful dismissal.

Osler, Q.C., and *Carscallen*, for the appellants.

MacKelcan, Q.C., for the respondent.

DIVISION COURT, CARLETON.]

[SPRAGGE, C. J. O.]

BANK OF OTTAWA v. McLAUGHLIN.

Division Courts—Increased jurisdiction—Balance of ascertained claim—Nonsuit at plaintiff's election—Moving against—Judicature Act.

In every case where the amount claimed in the action is a balance not exceeding \$200, the Division Courts have jurisdiction under the Division Courts Act, 1880, if the original claim was ascertained by the signature of the defendant, whatever may have been its amount.

The Judicature Act and rules, so far as they affect procedure, do not apply to the Division Courts, and rule 330 of the Supreme Court of Judicature is a rule of procedure applying only to the Courts to which it is in terms made applicable.

The plaintiff insisted upon being nonsuited at the trial, and a rule for a new trial was refused.

Held, that he was not precluded from moving against the nonsuit, and that an appeal would lie from the refusal to grant it.

Held, that, under 31 Vict. cap. 9, sec. 10, a promissory note might be stamped by the maker at any time of the day of making it, though after it had become complete by signature and endorsement.

Maritime Court.

[SENKLER, SUR., J., JULY, 1883.]

THE RED BIRD.

Wages under \$200—45 Vict. cap. 34 sec. 2, (D).

This was an action for the recovery of wages under \$200. The petition was demurred to on the ground that the court had no jurisdiction.

Held, following *The Robb*, 17 C. L. J. 66, that sec. 189 of *The Merchant Shipping Act*, 1854, has been impliedly repealed by the *Vice-Admiralty Courts Act*, 1863.

Held, also, that secs. 56 and 57 of *The Seamen's Act*, 1873 (36 Vict. cap. 129) have not been extended to the inland waters of Ontario by 45 Vict. cap. 34, sec. 2.

R. Gregory Cox, for the demurrer.

Patteson, contra.

(Reported by R. Gregory Cox, Esq., Barrister-at-Law.)

NEW BRUNSWICK.

Supreme Court.

[FEBRUARY, 1883.]

BOSS, *et al.* v. MILLER.

Practice—Entry of cause—Entry docket—Where wrongly entitled—Interlocutory judgment—Memorandum of—Judgment docket—Date of filing—Lapse of more than a year since last proceeding—Term's notice—Plaintiff delaying at defendant's request.

Held, by Weldon, Palmer, King and Fraser, JJ. (Allen, C. J. and Wetmore, J., dissenting), that the entry by the clerk is what constitutes the entry of a cause, and not the filing of the entry docket by the attorney; therefore where the writ and affidavit of service were filed with the clerk, with an entry docket describing one of the plaintiffs by a wrong name, but the clerk received the fees and entered the cause properly in his books, defendant was not entitled to have judgment set aside for the defect in the entry docket.

The statement of the date of entry of the cause, required by the 4th Rule of Hilary Term, 1875, to be written on the memorandum of interlocutory judgment is for the convenience of the clerk, and its omission is not a ground for setting aside the judgment.

It is not necessary to state on the judgment docket the day of filing.

Although where more than a year has elapsed since the signing of interlocutory judgment, a term's notice of the plaintiff's intention to proceed must ordinarily be given before signing final judgment; such notice is not necessary where the plaintiff has delayed proceeding at the defendant's request.

THE WATEROUS ENGINE WORKS CO. (LIMITED) v. CAMPBELL, *et al.*

Joint Stock Companies' Act 1877—Action by—Pleading—Declaration—Corporate name.

In an action brought by a company incorporated by letters patent under The Canada Joint Stock Companies' Act, 1877, it was held (on demurrer to the declaration), by Allen, C. J., and Weldon, Wetmore and

King, JJ., that the declaration was bad for not alleging the incorporation of the plaintiffs by letters patent under the Act ; but by Palmer J., that it was sufficient merely to describe plaintiffs by their corporate name.

[MARCH, 1883.]

FORBES, *Appellant*, AND TEMPLE, *Respondent*.

Statute of Frauds—Verbal promise—Whether primary or collateral—Hiring—Agency.

This action was brought to recover four and a half months' wages on an alleged verbal hiring by one H. as agent for defendant. At the trial, which took place in the Victoria County Court, the Judge ordered a nonsuit on the ground that the contract disclosed by plaintiff was a contract of guarantee and so within the Statute of Frauds, and also that the agency of H. was not made out. The evidence shewed that one M. was carrying on lumbering operations on the Tobique under a contract with defendant who was to supply him, and he (M.) was to receive so much per thousand. Defendant was also carrying on an operation on his own account in the neighbourhood, and H. had charge of the latter operation for defendant. He also attended to getting in the supplies to M., which defendant had contracted to give. It appeared that both M. and defendant's operations were to be promoted by the construction of a portage road from the Tobique through to the Nepisiguit Lake, and it was in connection with the laying out of this road, that the first hiring of plaintiff took place. Plaintiff said his first interview was with H. who asked him if he would go with him (H.) and look out a portage road to Nepisiguit Lake, that plaintiff said he would go, and shortly after this conversation, on the same day, he met M. and H., when the former asked him if he would go with them to look out the road. Plaintiff said he did not know, whereupon H. said, "If you go up, I will do what is right with you." He then agreed to go, and the next morning he went with M., H. and his crew, and laid out the road, after which, at M.'s request, he built a camp and cut out some hauling roads for M.'s lumbering operations, being employed altogether at this work (including the laying out of the road) about twenty days. After this plaintiff left and went home, and remained ten days, but before going he told M. he had business at home, and would be back in eight or ten days. On his way home plaintiff met H. with teams coming up, when he asked H. if he would pay him his wages if he went back to M. and worked for the concern, to which H. replied that he would. Plaintiff remained home ten days and went back and worked (in all) four months and fifteen days. More than a year after the work was done plaintiff applied to defendant for payment, which the latter refused, saying, that if H. had agreed to pay the wages, he (defendant) would pay, but that H. had denied making any such promise.

Held, on appeal, by Weldon, Wetmore and King, JJ., that the alleged contract between plaintiff and H. was collateral to the contract of hiring

that existed between plaintiff and M. and therefore within the Statute of Frauds; but by Allen, C. J., and Palmer, J., that it should have been left to the jury to say whether H.'s promise was primary or collateral.

Held, by Allen, C. J., and Palmer and King, JJ., (Wetmore, J., dissenting), that there was evidence for the jury of H.'s authority to employ plaintiff on defendant's behalf.

MARITIME BANK OF CANADA v. McKEAN *et al.*

Judgment—Setting aside—Assessment of damages—Affidavits for—Credits—Power of single Judge to assess in term—Affidavit—Swearing before attorney who prepares affidavits, but is not the attorney on the record.

Affidavits used on a motion to set aside a judgment may be sworn before the attorney who prepares the affidavits, he not being the attorney on the record.

A single Judge has power to assess damages during term, as well as in vacation.

The defendants carried on business as lumber merchants in St. John under the name of C. McK. & Co., and also had a house in Great Britain carried on under the name of C. & Son. Plaintiffs were bankers in St. John, and by an arrangement between them and McK., the partner residing in St. John, they were allowed to draw money from the plaintiffs' bank from time to time by cheques, they to pay interest on the overdrawn account. McK. was in the habit of making some cash deposits, and of drawing sterling bills of exchange on C. & Son, which the plaintiffs discounted, placing the proceeds to the credit of C. McK. & Co., who had received from the plaintiffs a pass-book similar to that usually supplied to their customers, in which the cheques were entered on one side (charged to C. McK. & Co.) and the cash and proceeds of the bills of exchange on the other (placed to their credit). The bank book was balanced from time to time by the officials of the bank, and on the 31st December, 1882, when the book was last balanced, the balance standing against C. McK. & Co. was \$25,362.06. Altogether, from November 11th to 31st December, C. McK. & Co. had drawn out \$80,633.09, and the difference between this amount and the balance shown by the book on the 31st December consisted of the proceeds of the bills of exchange. About the beginning of January, 1883, the firm in Great Britain (C. & Son) suspended payment, and the present action was commenced to recover the amount due from defendants to plaintiffs. At the time the action was begun four bills of £1000 each drawn the latter part of December had not been accepted, and were never accepted. The rest of the bills, however, had been accepted and were running at the time the action was brought, but were subsequently dishonored. Defendants did not appear and plaintiffs signed judgment by default for the full amount drawn out of the bank, namely \$80,633.09. The

affidavit to assess the damages was in the usual form for money lent, referring to an annexed account giving the dates and amounts checked out from time to time, and stating that the whole amount was due. It made no reference to the bills of exchange. The defendant McK. thereupon applied to have the judgment set aside, stating in his affidavit that the bills of exchange were accepted as payment and claiming that plaintiffs were only entitled to sign judgment for the balance shown by the bank pass-book, \$25,362.06. In answer to the application the cashier of plaintiffs stated that it was a rule of the bank, which McK. was aware of, not to discount any paper of which the drawers and drawees were the same persons, and that had he known that C. & Son and defendants were the same persons he would not have discounted the bills, and claiming that defendants committed a fraud on the bank. He also swore that the bills were not received in payment of the cash lent defendants.

Held, by Allen, C.J., and Weldon, King and Fraser, JJ., that the bills of exchange must be treated as a conditional payment, and if there were any circumstances (such as fraud) which would enable plaintiffs (before the bills matured) to elect to treat them as of no value, such circumstances should have been disclosed to the Judge in the affidavit for assessment of damages.

Held by Wetmore, J., that the affidavits of plaintiffs' cashier that the bills were not accepted in payment was an answer to the application, and also that defendants' motion should have been to be let in to defend.

On a motion to set aside a judgment the Court has power to order a reduction.

MANITOBA.

In the Queen's Bench.

(Reported by W. E. Perdue, Esq., Barrister-at-law.)

BLAIR v. SMITH.

Void registered instrument—Cloud upon title—Bill to remove.

Where a registry has been established for the purpose of showing to the world how the title to land is derived, the policy of the courts should be to keep the registry pure.

Therefore, where the registry showed a conveyance (under which, through mesne conveyances, the defendant claimed) from one who appeared on the registry to have theretofore parted with the land to the plaintiff, the court declared the claim of conveyances through which the defendant claimed, a cloud upon plaintiff's title.

The plaintiff claimed to be the owner of the land in question, under a deed from John Shultz, and divers mesne conveyances, under which the title conveyed by Shultz became vested in the plaintiff. Several deeds were registered upon the land subsequently to the registration of the plaintiff's deed, viz:—Hon. John Shultz to John Fraser; John Fraser to M. Fowler; and M. Fowler to the defendant W. C. Smith. The second deed from Shultz, was subsequent in date to the plaintiff's deed. The plaintiff filed the bill in this suit to have the three last mentioned deeds declared to be a cloud upon his title and to have their registration cancelled. The plaintiff's title to the land was not disputed, but it was contended by the defendant, that these deeds showing a title from a person who had already conveyed away all his estate in the lands, and the deed from Shultz being registered subsequently to the registration of the deed under which the plaintiff claimed title, the plaintiff did not require the intervention of a court of equity to declare them clouds upon his title, and that the relief sought was not such as a court of equity will grant. It was also objected at the hearing that Fraser and Fowler should have been made parties; and that, in any event, the court should not award costs against the defendant because the plaintiff should have made Fraser and Fowler parties and claimed costs against them.

Howell and Hough, for the plaintiff.

Killam, for the defendant.

TAYLOR, J.—In *Hurd v. Billinton*, 6 Gr. 145, the court refused to declare the deed objected to a cloud upon the plaintiff's title, but there the deed was, the court said, void upon its face, having been executed by an attorney who had no power to convey. But the court, while dismissing the bill without costs, prefaced the decree with a recital of the reasons for doing so. The decree with the recital the plaintiff could register, and by doing so he practically achieved the whole object of his suit.

The case of *Buchanan v. Campbell*, 14 Gr. 163, was a case of a voluntary deed which, as the law then stood in Ontario, was void as against the subsequent conveyance for value under which the plaintiff claimed.

"In later cases" it is said by the present learned Chief Justice of Ontario in *Dynes v. Bales*, 25 Gr. at p. 597, "the court has been more disposed than in *Hurd v. Billinton*, to regard an adverse and unwarrantable registration as a cloud upon title."

In support of that proposition the learned Judge quotes the judgment of the late Chancellor Blake, in *Harkin v. Rabidon*, 7 Gr. 243. That learned Judge said, at p. 249, "would it have been a reasonable answer that the plaintiffs could defend themselves at law? Would not the plaintiffs have a right to say, true, we can defend ourselves at law, but we have a right to come into equity for relief which we cannot have at law; we ask to have that deed cancelled, for the purpose of being placed beyond the reach of those dangers and annoyances which the improper use of it would at any moment entail, and for the further and more material purpose of having that removed which forms not only a cloud upon our title but in effect an incumbrance, detracting as it does most materially from the market value

of our property?" In *Truesdell v. Cook*, 18 Gr. at page 534, V. C. Strong, said, "I find no authority for saying that the existence of an unregistered deed, passing no interest and not appearing to be a link in the title, can give ground for the jurisdiction; but the registration has such a tendency to embarrass the title of the true owner that there would be a great want of remedy if this court could not decree cancellation in such a case." That observation, not necessary for the disposition of the particular case then before the learned Judge, and in which relief was denied to the plaintiff on other grounds, is no doubt a mere *obiter dictum*. It has however subsequently received judicial sanction, for in *Dynes v. Bales*, Chancellor Spragge said, "It places, as I think, the title to relief upon the true ground. *Shaw v. Ledyard*, 12 Gr. 382, was a case in which a bill was filed to set aside and remove from the registry a deed made by a sheriff on a tax sale, alleging that there had been no sale to warrant such a deed. There V. C. Mowat said, 'If two strangers, even through a mere mistake of fact or law, claim a man's property, and put on registry an instrument setting forth such claim or purporting to deal with it, such a claim, however unfounded must prejudice the sale of the property and may create embarrassment otherwise; and I would be sorry, unless compelled by the authorities, to hold that the owner is in such a case without remedy.'" He therefore overruled the demurrer for want of equity.

The latest case on the subject to which I was referred is *Dynes v Bales* 25 Gr. 593. There the plaintiff got relief against a conveyance from a person having apparently no title, and which had been registered subsequent to his own. Mr. Killam sought to distinguish that case from the present, on the ground that the relief there was given because the bill had been taken *pro confesso*. I do not think, upon reading the case, that that was the reason for giving the relief, notwithstanding the expressions made use of on page 595.

The learned Judge there put it that although there would be a defect, in the absence of a link in the chain of title between the grantee in the last registered deed and the grantor in the next, *i.e.* Scott, the grantor in the deed complained of, it would not necessarily follow that Scott had no title, for he might have had it as by descent.

So in the present case it does not follow that Schultz, when he conveyed to Fraser in April, 1881, had no title because he had previously conveyed to Emerson. Emerson might have re-conveyed to him before conveying to the plaintiff. The plaintiff at all events, if selling or mortgaging the lands, would certainly be called upon to explain and account for these subsequent conveyances appearing upon the registry.

Even should it be that the authorities found on the books do not fully warrant the making of a decree in the plaintiff's favour, in such a case as the present, I am quite prepared to extend the jurisdiction and to make a precedent.

In a country like the present, where lands pass from one owner to another so frequently, and with so little formality, and where a registry has been established for the purpose of showing to all the world who is the true owner, and how he derives his title, the court should in my opinion

stretch a point to aid in keeping that Registry pure, and see to it that nothing is improperly put there which can in any way embarrass the true owner, or prevent his dealing at any moment with his property in the most ample and beneficial manner.

The plaintiff is therefore entitled to a decree declaring the three conveyances in question a cloud upon his title.

As to the costs I see no reason why they should not be awarded against the defendant. It is true he was not the person who put on registry the first of the deeds which form the cloud, but he claims title to the property through that deed. The plaintiff's title appeared on the registry at the time the defendant took the conveyance to himself.

If he had the titles searched, he had actual notice, and should not have taken the conveyance he did. If he did not search he was careless and must bear the consequences. He had at all events constructive notice.

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EXPATRIATION.

A LAW came into force in the Dominion of Canada on the 4th of July last, by proclamation of the Governor-General published in the *Canada Gazette*, which, for the complete revolution it works in long established principles of English law as introduced and understood in this country, for its important bearing upon the legal condition or political *status* of Canadians as British subjects, and for its bearing—in conjunction with conventions entered into by the Crown with foreign states—upon our national character when abroad, deserves more than passing notice.

The law referred to is “The Naturalization Act, Canada, 1881,” corresponding to the Imperial “Naturalization Acts, 1870-1872,” which abrogates the old rule of law, *nemo potest exuere patriam*, and concedes the right of expatriation, thus sweeping away the formerly well known theory,—“once a British subject always a British subject.”

The Act relates to other matters, but it is with this particular feature of it that this article is intended to deal. It should, however, be premised that the proposition that allegiance is due from the subject to the Crown, or from the citizen to the Sovereign power of the State, (*a*) is

(*a*) British statesmen and writers now use the term “citizen” as the equivalent of the term “subject,” from which it may be inferred that they understand that there are no substantial rights or liberties incident to citizenship in a republic, that are not attached to the character of subjects under a monarchy with free representative institutions and responsible government.

different from the proposition that allegiance is indefeasible. The Act does not impair the allegiance due from the subject to the Crown, nor affect it in any degree, except in the case of those who put off their national character in the manner prescribed by the Act.

In order to a correct understanding of the new law it will be necessary to refer to the state of things previously existing, when it will appear that the doctrine of indelible allegiance, as connected with the national character of British subjects, had prevailed from the foundation of government, not only in England but also in Canada and the United States. The causes which led up to its abrogation will then be referred to; and then the provisions of the law will be looked at which are intended to introduce the new state of affairs.

As to who were entitled to the national character of British subjects prior to the Act in question, it is also to be borne in mind that, by the common law of England, every person born within the dominions of the Crown (with limited exceptions, such as the children of ambassadors and some others), and by various statutes (*b*) all persons being the children, or grandchildren, of British subjects, though born within the dominions of a foreign State, were to all intents and purposes British subjects, and to be adjudged and taken to be, natural born subjects of the Crown of Great Britain (*c*).

I. To refer shortly to the nature of allegiance as understood in England, it may be mentioned that, although the duty existed independently of the taking of an oath of allegiance, by virtue of what Sir Matthew Hale describes as "intrinsic allegiance" (*d*), yet such oaths were in use from the earliest times. As early as the time of King Arthur, and afterwards in the time of King Edgar, every man of

(*b*) 25 Edward III. st. 2; 7 Anne, cap. 5; 4 Geo. II. cap. 21; and 13 Geo. III. cap. 21.

(*c*) *Cockburn on Nationality* (1868), p. 11; *Wheaton's Int. Law*, Boyd's 2nd Ed., p. 205.

(*d*) *Hale, P. C.* vol. i. p. 67; and see 2 Inst. 121.

the age of twelve years or upwards might have been sworn to the King in the tourn or in the leet (*e*).

An oath of allegiance was prescribed by 1 Eliz. cap. 1, to be taken by certain public persons there referred to; and numerous statutes provided for taking such oaths. The oath prescribed by the B. N. A. Act, 5th schedule, is, that "I will be faithful and bear true allegiance to Her Majesty Queen Victoria." An oath of allegiance is also prescribed by the Ontario statute respecting public offices, R. S. O. cap. 15.

It was said in *Calvin's* case (*f*) that it is of the essence of high treason that it is *contra ligeantem*, and the statutes relating to that crime, passed at various periods of our history, such as 25 Edw. III. cap. 2, 3 & 4 Wm. IV. cap. 4 (C. S. U. C. cap. 97), and 2 Vict. cap. 27 (L. C.), show how the breach of the duty of allegiance is regarded by the law.

So the formal language of an indictment for high treason implies allegiance as a sacred duty as follows:—"The jurors, etc., present that J. S., being a subject of our lady the Queen, not regarding the duty of his allegiance * * * and wholly withdrawing the allegiance, fidelity, and obedience, which every true and faithful subject of our said lady the Queen should and of right ought to bear towards," etc. (*g*).

And in the case of a peer of the realm, articles of impeachment for high treason recited that J. S., "being a subject of His Majesty, and having withdrawn that due obedience, fidelity and allegiance which as a loyal subject he owed, and of right ought to bear to his only true, lawful, and undoubted sovereign of this kingdom," etc. (*h*).

(*e*) *Hale*, P. C. vol. i. p. 6; Com. Dig. vol. 1, p. 554, citing Co. Lit. 68b, 172b. In Shakespeare's *Henry VI. Pt. II. Act v. Sc. i.*, Buckingham is made to say to the Duke of York:—

" * * * why thou,—being a subject as I am,—
Against thy oath and true allegiance sworn,
Should'st raise so great a power," etc.

(*f*) 7 Rep. 1.

(*g*) *Arch. Crim. Pleadings* (17th Ed.) 20.

(*h*) *Lord Lovat's Case* (1746), *State Trials*, vol. xviii. p. 546.

In *Calvin's Case* (i), adjudged in 1609 by the Court of Exchequer, a much quoted authority, the fundamental principles governing the question are laid down. "Ligeance" is there defined as "the true and faithful obedience of the subject due to his sovereign. This ligeance and obedience is an incident inseparable to every subject" (p. 8); and it is said to be "a quality of the mind and soul, not confined within any place" (pp. 12, 16); that it is due by the law of nature (p. 22); and that "the ligeance of the subject is of as great an extent and latitude as the royal power and protection of the king, *et è converso*" (p. 13); that the maxim was, *protectio trahit subjectionem et subjectio protectionem*; and that "power and protection draweth ligeance, and it followeth that seeing the king's power, command, and protection extendeth out of England, that ligeance cannot be local or confined within the bounds thereof" (p. 16); and it was held to be due at all times and in all countries (j).

Sir W. Blackstone, writing in 1765, defines it as the "tie or *ligamen* which binds the subject to the king in return for that protection which the king affords the subject" (k). Sir M. Foster says, "Natural allegiance, namely, that which is due from all men born within the king's dominions, and which arises by nature and birth, is founded in the relation every man standeth in to the Crown, considered as the head of that society whereof he is born a member, and on the peculiar privileges he deriveth from that relation, which are with great propriety called his birthright (l). It is a reciprocal bond, by which the subject is held to obedience and the king to protection (m).

This allegiance was by the common law of England, held to be indefeasible (n) or perpetual, a doctrine which has given rise to much controversy, and which

(i) 7 Rep. 1, and xviii. State Trials.

(j) *Broom's Com.*, vol. i., p. 445.

(k) *Comm.* 369, 370.

(l) *Foster's Crown Law*, 183 (1762).

(m) *Com. Dig.* vol. i. p. 553, cit. *Calvin's Case*; *Chitty on Prerog.* 10.

(n) 1 Inst. 129a; *Cockb. on Nationality*, pp. 63, 128.

has been urgently assailed, especially by American statesmen, although at the same time, and until 1868, it continued to be law in the United States, as will presently be shown. Sir M. Foster, in his work on Crown Law already referred to, speaking of the privileges derived from the relation above mentioned, at p. 183, says, "This birthright, nothing but his own demerit can deprive him of; it is indefeasible and perpetual; and consequently the duty of allegiance which arises out of it, and is inseparably connected with it, is, in consideration of law, likewise inalienable and perpetual"; and he refers to a then modern case "in which this doctrine was treated by the Court as a point never yet disputed." That was the case of *Æneas Macdonald* (o), who was tried for high treason in the King's Bench, for having borne arms in the rebellion of 1745. It appeared that the prisoner had been brought up from early infancy in France, and that he held a commission from the French king. His counsel, in addressing the jury, spoke of the doctrine of natural allegiance as a slavish principle, derogating from the principles of the revolution. But the Court interposed and said it never was doubted that a subject born, taking a commission from a foreign prince and committing high treason, may be punished as a subject for such treason, notwithstanding his foreign commission, and that it was not in the power of any private person to shake off his allegiance, or transfer it to a foreign prince; nor was it in the power of a foreign prince, by naturalizing or employing subjects of Great Britain to dissolve the bond of allegiance between them and the Crown. Lord Chief Justice Lee told the jury that the only fact to be tried was whether he was a subject of Great Britain, as in that case he must be found guilty. He was found guilty and received sentence of death as in cases of high treason; but received a pardon on condition of banishment (p).

"Nothing," said Vice-Chancellor Shadwell, in a case before him in 1847, "I apprehend can be more certain, than

(o) *Foster's Cr. Cas.* p. 59, and *State Trials*, vol. xviii. p. 858.

(p) *Cockb. on Nationality*, 64, note n.

that a natural born subject cannot throw off his allegiance by any such acts," referring to naturalization in the United States (*q*).

And as recently as 1867 the doctrine was reaffirmed by Chief Baron Piggott and Mr. Justice Keogh at Dublin, on trying a charge of treason felony. A jury *de medietate lingue*, consisting half of subjects and half of foreigners, was applied for, on the ground that the prisoner, though born in Ireland, was a citizen of the United States, having been naturalized there; but the application was refused, the Court ruling that according to the law of England, a law which had been administered without variation or doubt from the earliest times, he who once was under the allegiance of the English sovereign remained so for ever (*r*).

When the Crown has asserted, as of right, its claim to the subject's allegiance, such claim has been based on the Royal Prerogative. Thus, in 1806, Sir John Nicholl, King's Advocate, advised the government that His Majesty by his royal prerogative had a right to require the services of all seafaring subjects against the enemy, and to seize them by force wherever they should be found. "This right," he said, "had from time immemorial been asserted in practice and acquiesced in by foreign nations" (*s*).

And, in 1807, in exercise of a right—of which Sir R. Phillimore says, "Every State has the right of recalling (*jus avocandi*) its citizens from foreign countries, especially for the purpose of performing military services to their own country" (*t*)—the King's proclamation was issued, recalling the seafaring subjects referred to, and expressly denying that letters of naturalization or certificates of citizenship given them by foreign governments could in any manner divest natural born subjects of the allegiance owing to their lawful sovereign (*u*). And so, according to Sir R. Phillimore,

(*q*) *Fitch v. Weber*, 6 Hare, 63.

(*r*) *Cockb. on Nationality*, p. 50.

(*s*) *Cockb. on Nationality*, p. 72.

(*t*) *Phill. Int. Law*, 2nd Ed., vol. ii., p. 377.

(*u*) *Cockb. on Nationality*, p. 73.

the law of England "affixed until quite recently on all who were born of parents who were not enemies within its territory an indelible allegiance" (v).

The law of England, observes the late Lord Chief Justice of England, Sir Alex. Cockburn, asserts "as an inflexible rule, that no British subject can put off his country, or the natural allegiance which he owes to the sovereign, even with the assent of the sovereign; in short, that natural allegiance cannot be got rid of by anything less than an Act of the legislature, of which it is believed no instance has occurred" (w).

II. Having shown that the doctrine of indelible allegiance was the invariable law of England from the earliest times to the recent date already mentioned, we shall now attempt to show that it became part of the law of this country at the time of its conquest and cession in 1763, and has since continued to be part of our law until the 4th July last.

Upon the principle laid down in *Calvin's Case*, and referred to in other authorities mentioned, that allegiance is a reciprocal bond by which the subject is held to obedience and the king to protection, it would apparently be sufficient to show that the sovereignty of the British Crown became in fact established in this country upon the conclusion of the Treaty of Paris, 10th July, 1763, and the issue of the proclamation of the King of England which followed it in October of that year, the Imperial enactment of 1774, enlarging the limits of the Province of Quebec and introducing the law of England, and the appointment of a Governor,—and to argue that these latter being acts of sovereignty, the relationship of subject and sovereign, governed and governor, was then established between the inhabitants of this country and the King of England, and that from that relationship sprang at once the duty of allegiance on the part of the people of this country to the British Crown, an allegiance too of that nature alone which was known to the common law of England, and known

(v) *Phill. Int. Law*, 2nd Ed., vol. 1, 377.

(w) *Cockb. on Nationality*, pp. 63 and 177, citing *Calvin's Case*, etc.

to the Crown's prerogative—namely—an indelible allegiance.

Uninhabited countries discovered and planted by British subjects, and countries acquired by conquest or cession, are differently regarded with reference to the laws to be introduced (*x*). But those considerations would not necessarily enter into the question of allegiance, which depends, as we have seen, upon the relation of sovereign and subject; and in whichever manner the territory may have been acquired, so soon as it becomes part of the dominions of the Crown, the inhabitants come at once under the sovereignty of the Queen, for sovereignty is one of the essential attributes of the Crown (*y*).

“Those fundamental rights and principles on which the King's authority rests,” says Mr. Chitty, “and which are necessary to maintain it, extend even to such of His Majesty's dominions in which the English laws do not, as such, prevail. The rights of the sovereign, which are merely local to England, and do not fundamentally sustain the existence of the Crown, or form pillars on which it is supported, are not, it seems, *prima facie* extensible to the Colonies or other British dominions which possess a local jurisprudence distinct from that prevalent in and peculiar to England. * * * Sovereignty is one of those essential attributes of the Crown which are inherent in and constitute His Majesty's political capacity, and prevail in every part of the territories subject to the English Crown, by whatever peculiar internal laws they may be governed” (*z*).

The Imperial Act 14 Geo. III. cap. 83—entitled “An Act for making more effectual provision for the government of the Province of Quebec in North America,”—clearly shows that the relationship of sovereign and subject was then established. This Act received an additional entitling or caption at the hands of the learned revisers under

(*x*) *Calvin's Case*, supra; *Clarke's Col. Law*, p. 4 *et seq.*; *Leith's Black.* 2nd Ed. p. 33; and see *Chapman v. Hall*, Cowp. 204.

(*y*) *Chitty on Prerog.* p. 25.

(*z*) *Ibid.* p. 25.

whose supervision the Statutes of Canada, 1859, were consolidated, which is as follows:—“*Imperial enactment concerning the boundaries and constitution of Canada and the political rights of His Majesty's Canadian subjects;*” and without enquiring under what circumstances the entitling of a statute may be looked at, with a view to its interpretation, it may be observed that this additional caption indicates to some extent the light in which the Act had come to be regarded by the learned revisers and by the Parliament of Canada; it is a constitutional Act, and relates to the “political rights of Her Majesty's Canadian subjects.” The placing of the inhabitants of this country under this constitutional law, and defining their political rights, were acts of sovereignty. In the 5th section the inhabitants are expressly referred to as “His Majesty's subjects,” and the same section grants privileges to the persons there mentioned “subject to the King's supremacy”; and by the 7th section an oath of allegiance is prescribed as a substitute for the oath prescribed by 1 Eliz. cap. 1, in which the deponents say that they “will be faithful and bear true allegiance to His Majesty King George,” etc. The 8th section grants His Majesty's Canadian subjects (with exceptions there mentioned, immaterial to this argument) certain privileges as to holding and enjoying property, with their existing customs and usages relative thereto, and all other civil rights, but in “such large, ample and beneficial a manner * * * as may consist with their allegiance to His Majesty, and subject to the Crown and Parliament of Great Britain.” By the 9th section a further act of sovereignty is exercised in prescribing the criminal law to be enforced as the law of the Province; and the 17th section reserves to the British Crown the right to constitute Courts and appoint Judges—a further act of sovereignty, and one in harmony with the maxim of English law—that the King is the fountain of justice.

The appointment of the first Governor has been alluded to as one of the first acts of sovereignty exercised by the King of England over this country. In addition to that, it is to be remarked that the Governor represents the Queen

in her political character, and in certain matters the Crown prerogatives (a). "They are invested," says Mr. Chitty, "with royal authority, and exercise certain kingly functions, such as calling, proroguing, and dissolving parliament" (b). Upon the entry, therefore, of a Governor so appointed into the sphere or province of his duties, the relation between the subject and the Crown, which draws to it allegiance, is at once established and confirmed.

It has been said that, as an incident to the tie of allegiance, the peculiar prerogative rights of the Crown may be exercised upon the subject. As to their being exercised in colonies, the learned author just quoted observes, "The Royal prerogative in the colonies, unless where it is abridged by grants, etc., made to the inhabitants, is that power over the subjects, considered either separately or collectively, which by the Common law of England, abstracted from Acts of Parliament and grants of liberties from the Crown to the subject, the King could rightfully exercise in England" (c).

But we are not without decisions of the highest authority in our own Courts bearing upon the subject. In the Court of Queen's Bench for Upper Canada, in 1845, in a case (d) in which the principal question before the Court was whether 9 Geo. II. cap. 36 (the Statute of Mortmain), was in force in Upper Canada, Sir J. B. Robinson, C.J., took occasion to trace the history of the introduction of the laws which governed the colony; referring to it as "a conquered or ceded country," and as "the conquered Province of Canada, ceded by the French Government by the Treaty of Paris," and "in which, therefore, after the cession, it was in the power of the Crown, independently of the legislature, to have introduced either the laws of England or any other." And again the learned Chief Justice speaks of the proclamation of October, 1763, as "introducing the law of England

(a) *Le Noir v. Ritchie*, 3 S. C. R. 575.

(b) *Chitty on Prerog.* p. 34; *Chapman v. Hall*, Cowp. 204, 208 (1763); *Clarke's Col. Law*, 4.

(c) *Chitty Prerog.* p. 33, citing *Chalmer*, Col. Op. 232-3.

(d) *Doe d. Anderson v. Todd*, 2 U. C. R. 82.

in general terms into countries ceded by the treaty of Paris,"—observing that it "assured to the inhabitants the enjoyment of the benefit of the laws of England" (p. 85).

It is evident, therefore, whether we view it as part of the common law of England, or as a prerogative right of the Crown, that the doctrine of indelible allegiance became part of the law of this country at the time that the sovereignty of the British Crown was established over it.

This doctrine, however, is expressly affirmed by the same eminent authority just cited, as part of the law of this Province. In the case of *Doe d. Hay v. Hunt* (e), Robinson, C.J., delivering the judgment of the Court, referring to the plaintiff's ancestor, observes that he "was born a British subject, being the child of British subjects born within the dominion of the British Crown, Detroit being beyond all question British territory in 1769, the time of his birth. He had not in our opinion lost his *status* of a British subject in 1813, when H. Hay died, nor indeed up to the time of his death, though he may have entitled himself to be regarded in the United States as an American citizen, and may have enjoyed all the rights of American citizenship. His claiming such rights, however openly and unequivocally, his enjoying them rightfully according to the laws of the United States, or usurping them wrongfully, if he was suffered to do so, would not deprive him of his legal character of a British subject, nor would he lose that character by disclaiming to be a British subject, or even abjuring allegiance to the Crown. I mean, that upon general principles of law it is true that he could not by any such conduct divest himself of his allegiance, and had no choice to exercise."

His lordship here affirms the doctrine in the clearest and fullest manner possible, contemplating the case of a man who "had entitled himself to be regarded in the United States as an American citizen," *i. e.*, by naturalization, including as it does there, the "abjuring of allegiance to the Crown." The principle is pushed to its utmost limit, and

(e) 11 U. C. R. 381.

its inflexibility shown in the strongest light. This enunciation of the rule by so eminent an authority is especially worthy of note, because it was this view of the doctrine and its operation in the particular direction mentioned by his lordship, which afterwards, when it had grown to be of vast importance, engaged much of the attention of the British Parliament and of many eminent jurists and statesmen who took an active interest in the measure which has since become law.

In a later case (*f*), in 1866, Chief Justice Draper refers to the rule as then prevailing in this Province, citing the case already referred to of *Æneas Macdonald* (*g*), as laying it down that, "it is not in the power of any private subject to shake off his allegiance and to transfer it to a foreign prince."

The learned Chief Justice also cited Sir W. Blackstone to the effect that natural allegiance "could not be forfeited, cancelled, or altered by any change of time, place, or circumstance."

And in the case of *Regina v. Lynch* (*h*), on motion for a new trial, Hagarty, J., upheld the direction of Wilson, J., to the jury, at the trial in which the learned judge had reiterated the rule, instructing the jury that the rule of law was, "once a British subject always one." Although that does not appear to have been material to the case, or indeed to the preceding case of *Regina v. McMahon*, the prisoner not having been placed upon trial for treason, but under a Provincial Statute for felony, yet, the question having been brought under the notice of the Court by counsel for the prisoner, the learned judges recognized the rule stated as then being the law of this Province.

A. HOWELL.

(*To be concluded.*)

(*f*) *Reg. v. McMahon*, 26 U. C. R. 195.

(*g*) Foster, p. 59 (1745).

(*h*) 26 U. C. R. 208.

SOME MINOR ADVANTAGES OF THE TORRENS SYSTEM OF LAND TRANSFER.

From the publications of the Cobden Club in England, and of the Canadian Land Law Amendment Association here, all persons interested in the subject of land transfer have become more or less familiar with the advantages of the Torrens system. Any person of ordinary intelligence can easily understand the advantages of carrying in his pocket a certificate of title to a piece of land which is guaranteed as absolute and indefeasible, and behind which there can be no investigation. He can also see the advantages of the short modes of transfer, by which a sale or transfer of land may be made in a few moments, the old certificate being surrendered to the Registrar, and a new certificate issued to the purchaser, certifying that he has become the owner.

There are, however, some minor advantages almost unknown to our present mode of conveyancing. For example, an owner of land may wish to borrow a sum of money upon his land. He may live in Ottawa, and may come to Toronto, as being the great money centre of Ontario, to make the most favourable terms he can. He brings with him his certificate of title. Say the property is worth \$10,000, and he wants for a few weeks or days to borrow a trifling sum, say \$500. He can go to a Loan Company with his certificate, which he may deposit as an equitable mortgage, and give his note as collateral for three or six months. His certificate is evidence of his ownership of the land, unless some caveat shall have been registered. The lender then would only have to telegraph to Ottawa to see if any caveat had been lodged since the certificate was granted. A caveat would be lodged in the case of an execution binding the lands, or of taxes being chargeable against it. On being advised of

no caveat being filed the lender would advance the money and forward a caveat or warning of his claim. That caveat would remain on the duplicate certificate in the Registry office. The owner could not dispose of his land in the first place, because his certificate of title would not be forthcoming, and secondly, because the caveat of the lender would prevent his doing so. On the owner notifying the Registrar to have the caveat removed the Registrar would notify the lender who would take active means in Court to enforce his equitable mortgage.

Now the advantage of this is that if a man had a certificate of title, and the lender knew the property, he could borrow money anywhere without delay or expense. Another minor advantage under this system is that all general liens would be done away with. Before an execution would bind the land the sheriff must file a caveat against it. We would then find solicitors much more active than at present in searching out the lands of debtors and not making the solvent borrowers pay Sheriff's and Treasurer's fees because of a few insolvents, or careless owners of land. At present conveyancers search to see that there are no executions or taxes against the lands of the borrowers. That is ninety-nine borrowers pay \$1.55 each, because one man in a hundred on an average has an execution against him, or has neglected to pay his taxes. It is a fact, as any conveyancer in extensive practice will certify, that the money paid by solvent borrowers for fees to the Sheriff and Treasurer would more than twice pay all the undisclosed executions or taxes discovered by searching.

The next advantage, if it can be called a minor advantage, is the enhanced selling value of lands by reason of the certainty of title and the facility of transfer. John Stuart Mill and others have estimated that the effect of such a safe, cheap, simple, and expeditious method of land transfer as this is would add from 5 to 10 years' purchase to the value of all the land in England. In Australia it has been found that lands held under the Torrens title are much enhanced in value, and in all advertisements of land sales it is advertised that lands are held under the Torrens title

where such is the case, and few persons will now buy land unless it is held under a Torrens title.

Another advantage is the safety afforded to *cestuis que trustent* under settlements. It was supposed that *cestuis que trustent* would be in a worse position under this system. One of the most eminent examiners of titles in Australia gives it as his opinion that the *cestuis que trustent* are if anything in a better position under the Act than under an ordinary settlement, where trustees have usually absolute power of sale or exchange. He says, "The power of caveating, whether by the Registrar-General or others, on behalf of the cestui que trust, is ample, and in addition the words 'no survivorship' in a certificate of title issued to two or more persons as trustees has been found a most valuable protection to beneficiaries."

Another minor advantage is the system of giving an abstract to enable the owner to sell the land outside of the Province. This proceeding and some other minor advantages of this system will form material for further consideration.

BEVERLEY JONES.

EDITORIAL REVIEW.

The Torrene Syetem of Land Transfer.

We print at another page some remarks upon the advantages of this system. Not being familiar with the details of the Australian statute on the subject, we are unable to enter into a close criticism of the system. It has been likened to the mode of transferring property in ships; and some advocates of the system allege that it is as easy to transfer land under it as it is to transfer personal property at present. Now the former is as technical a process as it possible to conceive, as any one will attest who has attempted to draw the necessary papers and procure the certificate from the customs officer; while any one buying personal property of any value runs risks as to the title utterly unknown to the law of real property; see *Walker v. Hyman*, 1 App. R. 345; *McDonald v. Forrestal*, ante, p. 447, and many other like cases.

In connection with the subject we may notice a pamphlet recently issued by the Canada Land Law Amendment Association, containing their prospectus and constitution with remarks upon the present system of land transfer in Ontario, and the Torrens system, together with suggestions for the amendments of the law of descent.

“The study of the law of real estate,” says the writer of the pamphlet, “is a recondite one, and even amongst the legal profession there are few who attain a complete mastery of the subject”—an assertion which receives ample proof from our author upon a perusal of his pages. This treatise on the “defects in the present land laws” loses weight as much from its matter and the style in which it is written, as from the fact that it has been written by a partisan.

The advantages of the Torrens system cannot be appreciated without presenting its details for consideration, and that has not been done in the pamphlet. The abolition of all limitations of estates is said to be one of the greatest benefits. Estates tail, remainders, springing and shifting uses, and executory devises, are viewed as a nest of reptiles, all to be destroyed at a blow by the introduction of the Torrens system. "We should no longer have any necessity to resort to devises for 'barring the entail,' " says our author. Considering that there is no difference between barring an entail and conveying a piece of land held in fee simple, so far as the preparation of the conveyance is concerned, the remark is without much weight.

But the suggested alteration does not apparently make the changes expected by the association, at least if the British Columbia Act, cited by our author, is a fair representation of the system. By "The Land Registry Ordinance, 1870," of that Province, production of title deeds may be demanded by the Registrar or their non-production must be explained (sec. 26). Express provision is made for registering the title of remainder-men (sec. 29), and for the registration of future and contingent interests (sec. 30); equitable mortgages may evidently exist (sec. 33), though not protected even by notice (sec. 40); and the Act is apparently permissive only (sec. 19).

That the Torrens System possesses advantages, it would be idle to deny, but if its advocates desire success they should disseminate a better class of literature than the pamphlet in question.

That it possesses disadvantages is also apparent. The present law no doubt has many defects, due, not to the want of common sense of any one, but to its historical growth. As reforms were needed they have been made, and as they are needed in future they will no doubt continue to be made. At present there is no outcry about the land laws of Ontario. Our system of registration is a very good one, and very easily understood, and most of the trouble respecting titles arises from the ignorance of unprofessional conveyancers and the stinginess of vendors and purchasers of

land. A registered title to a farm lot can be conveniently investigated in half a day; and even a title to land in Toronto, which has by far the longest titles in the Province, can be searched in a day or two. There is more reason for a reform in New York, and more need for Mr. Olmstead's criticisms and suggestions there than here, for their system of registration is very incomplete and cannot compare with ours. We believe that it is impossible to investigate a title in New York without the aid of official searchers, and then one is entirely at their mercy—an evil unknown to our system.

One of the first objections to the introduction of the Torrens System into the older Provinces is the fact that the title of every lot would have to be investigated and quieted before a certificate could be granted. While this might be easily accomplished in the great majority of cases, those titles which would not bear the test at the moment of the adoption of the change would stand condemned, though if left alone they might become marketable titles.

Another objection to the system, and no mean one, is the impossibility of limiting estates in land so as to provide for thriftless and improvident people and for many other unfortunate persons who require such protection. This system, as we understand it, affords no such facilities. Absolute ownership, saving the rights of the Crown, is its badge, together with facility of disposition of property; and some active interference on the part of a beneficiary is necessary in order to protect his land from sale without his consent.

And finally, the reformers must encounter the whole army of unprofessional conveyancers, whose influence is so strong, in the Legislature of this Province at least, that any measure which is likely to work a change in conveyancing is hardly to be thought of in the House.

Recent Canadian Legislation.

The business of the Parliament of Canada is of more interest to statesmen than to lawyers, as a rule. The Statutes of Canada for 1883 come to hand in a bulky volume.

There are a few Acts which are of interest to the profession. Chapter 9 provides for the salary of the additional judge of the Court of Appeal for Ontario; section 2 provides that if the President of any one of the Divisions of the High Court of Justice be elevated to the Court of Appeal, the Governor in Council may direct that his Lordship's allowance for pocket money shall not be decreased. The law respecting retiring allowances to judges, 31 Vict. cap. 83, sec. 3, is made applicable to the Supreme Courts of Judicature of Ontario and Prince Edward Island. A very good instance of the oblique jurisdiction of the Parliament of Canada over the administration of justice in the Provinces is to be found in the seventh section of this Act, which cuts off the circuit allowances of the Judges of Appeal in Ontario, after the 1st of July next.

Chapter 10 provides for criminal procedure in the High Court of Justice for Ontario, some such provision having been thought necessary since the passing of the Judicature Act. It is questionable now whether this Act has any effect, considering the decision in *The West Huron Election case*, ante p. 446.

Chapter 21 permits any note made before the 4th March, 1882, the day of the repeal of the Stamp Act, to be given in evidence, though not properly stamped, provided that the circumstances are such that the holder would have been expected to affix double stamps before that date. It is hardly likely that the Act will be required at this period.

Perhaps one of the most important enactments, from a constitutional point of view, as an assertion of Federal power, that the Parliament of Canada has ever passed, is to be found in the Act to amend the Consolidated Railway Act of 1879. Section 6 recites that part of the British North American Act, sec. 92, number 10, (c) whereby there is excepted from the exclusive operation of Provincial jurisdiction "such works as, though wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces." It then declares certain

railways to be for the general advantage of Canada, and immediately brings them all within Federal jurisdiction. This is but one, however, of the many indications of the concentration and centralization of power in the Dominion Parliament which are contained in the British North America Act. That body, by its mere fiat, thus acquires jurisdiction over corporate bodies and works which the Provinces have originated.

The Liquor License Act we have already to some extent noticed, ante p. 319.

Chapter 34 simplifies the procedure in criminal matters against corporations. Such bodies are required to appear by their attorneys in the court in which the indictment has been found, and plead thereto. It shall not be necessary to remove the indictments by *certiorari* to compel the corporation to plead, but after notice to the corporation a plea of not guilty may be entered, and the trial then proceeds as if the defendants had appeared and defended.

By Chapter 35 the provisions of 31 Vict. cap. 76, which provides for taking evidence in Canada in relation to civil matters pending before foreign tribunals, are made applicable to criminal matters.

The Status of the Church of England in Canada.

A very learned and able debate has taken place in the Provincial Synod of the Church of England in Canada, upon the right of that Assembly to elect a Metropolitan Bishop. It was ably contended that no such right existed, but that Her Majesty still had the right to make the appointment. We did not think that the question could be seriously raised in the face of such authorities as we have on the subject. If it be conceded that the Crown has power to appoint the Metropolitan Bishop, the power must also reside in the Crown to appoint the Bishops, of the Colonial Church. In order to maintain this position it must be shown that the Church of England occupies a different situation from other religious bodies. But the contrary has been decided in the Upper Canada and Ontario Courts; *Dunnett v. For-*

neri, 25 Gr. at p. 205 ; and the contrary is declared to be a fundamental principle of colonial civil policy by C. S. C. cap. 74 ; and the removal of all semblance of connection between Church and State was one of the objects of C. S. C. cap. 25 sec. 4. The Church of England in the British Colonies is simply a voluntary association ; *Dunnett v. Forneri*, 25 Gr. at p. 206 ; *In re Bishop of Natal*, 3 Moo. P. C. N. S. at p. 148 ; *Long v. The Bishop of Cape Town*, 1 Moo. P. C. N. S. at p. 461, and see *Todd Parl. Gov. Col.* pp. 204 *et seq.* She is on the same footing, not only with other religious bodies, but with all other voluntary associations, and may make rules by-laws or canons for the governing of her members just as any other religious or lay association. A Bishop has no legal *status* before a court of law. He is only known as such when his position in the Church is defined and explained by evidence. The ecclesiastical laws do not run into the Colonies ; *In re Bishop of Natal*, 3 Moo. P. C. N. S. 115. Infringement of the rights of property or some other civil right must occur in the case of a member of the Church as such, in order that the Court may have jurisdiction.

BOOK REVIEWS.

A Practical Treatise on the Law of Absconding Debtors, as administered in the Province of Ontario, with a large number of forms of proceedings that will be found useful and convenient in the practical application of the Absconding Debtors Act. By JAMES SHAW SINCLAIR, Q.C., Judge of the County Court and Local Judge of the High Court of Justice at Hamilton. Toronto: Carswell & Co., 1883.

The plan adopted by Judge Sinclair is simply an annotation of the Absconding Debtors Act. A great deal of industry is shown by the very full and ample references to authorities, and the learned Judge's own expressions of opinion (*obiter dicta* of course) evince some thought. The book is compact and has a great deal of information in a small space. The references to authorities are voluminous. It will be a most useful book for the practitioner's office, since, in addition to furnishing the means of ready references to authorities, it contains a number of forms of proceedings. A solicitor who is called upon to act in the case of an absconding debtor must generally act promptly, and circumstances sometimes present themselves upon which it is difficult to advise on the spur of the moment. With this work at his elbow he will find his way cleared to every point which has so far been decided.

With respect to the twenty-first section of the Absconding Debtors Act, which is repealed by 4 Vict. cap. 6, sec. 4, s-s. 4, the learned writer thinks that the repeal was by mistake. When reviewing the repealing enactment we took occasion to make some remarks upon the repeal, ante p. 187. The repealed section seemed to have been aimed not so much at judgments obtained by fraud (for they were never valid), as at the *priority* gained by fraud or collusion upon a

bona fide debt. Section 20 referred to the priority of execution upon a judgment signed upon process served before the writ of attachment. Section 21 referred to "such judgment" when obtained by collusion or fraud; and its effect was to destroy the priority so gained, though the debt may have been a *bona fide* one. Since the new enactment makes all execution creditors share rateably whose writs come to the sheriff after the attachment, section 21 was unnecessary.

The typography of the book is excellent, but the proof-reading is not uniformly done. A very noticeable, though not a misleading, mistake occurs in the citation of 46 Vict. cap. 6, which is cited as 45 Vict.

A Manual of the Practice of the Supreme Court of Judicature in the Queen's Bench and Chancery Divisions. Intended chiefly for the use of Students. Third Edition (embodying all alterations effected by the Rules of 1883). By JOHN INDERMAUR, Solicitor. London: Stevens & Haynes, 1883.

Mr. Indermaur's work is a compilation in narrative form of the Rules of the Supreme Court of Judicature. Such a work requires no little effort and no little boldness, inasmuch as the effect not of one rule alone, but of many, must be stated, which is only another way of saying that the treatise involves the construction of all the rules. Its usefulness cannot be denied. A much more intelligent idea of practice can be gained from a perusal of the rules in narrative form than from reading the bald rules themselves; and we have no doubt that in the study of the new rules, which come into operation shortly, many practitioners as well as students will avail themselves of our author's labours.

REVIEW OF EXCHANGES.

Albany Law Journal—7th July, 1883.

Common Words and Phrases. Term; indorsed; brought; commenced; navigable; article of manufacture; debt owing or accruing; permit; open; property; debtor having a family; manufacture; wearing apparel, are defined.

The Presumption of Knowledge, by JOHN D. LAWSON. Concluded in the following number. Rule 1. Every one is presumed to know the law when ignorance of it would relieve from the consequences of a crime, or from liability upon a contract. Rule 2. But there is no presumption of knowledge of private or foreign laws. Rule 3. Persons engaged in a particular trade are presumed to be acquainted with the value of articles bought and sold therein, the names under which they go in such trade, and the general customs obtaining and followed there. Rule 4. The contents of a writing signed by a party himself, or by another at his request, are presumed to be known to him, and so of a paper drawn up by one for another, and the matters referred to in such writing. Rule 5. The burden of proof is on the party to show a material fact of which he is best cognizant. Rule 6. The burden of proof of notice to a *bona fide* purchaser is on the person alleging such notice. Rule 7. There is no presumption that a person not called as a witness has any knowledge of facts. These rules are illustrated by citation of authorities.

Ibid.—21st July, 1883.

Security; printed and published; insuring; left unoccupied; connected with the use and operation of the railway; at; commodities; common schools; saloon; law; are defined.

Ibid.—28th July, 1883.

Pregnancy as Ground for Avoiding a Marriage. Some American cases are cited illustrative of the rule that there is no implied warranty of chastity on the part of a woman contracting marriage, but where there is concealed pregnancy by another man, relief will be given to the deceived husband.

Ibid.—4th August, 1883.

Common Words and Phrases. Gag ; manufacturer ; game—gaming-room ; charge or control ; peril of the sea ; are defined.

Conveyances to Husband and Wife, by ISAAC N. PAYNE. The question whether there can be any tenancy other than one by entireties as between husband and wife is discussed. American cases are cited to show that in some States the common law obtains, in others it does not. It has been held that an act giving the wife control over her separate estate does not affect the estate by entireties. But in Ontario this has been doubted ; *Griffin v. Patterson*, 45 U. C. R. 536 ; and in England the contrary has been held, *In re March, Mander v. Harris*, W. N. 1883, p. 116.

Ibid.—11th August, 1883.

Element of Intention in Conversion. Cases are cited illustrative of the rule that where there is no assertion of dominion over the property there is no conversion.

Dissection and Resurrection, by R. VASHON ROGERS, JR. English and American cases are cited.

Ibid.—18th August, 1883.

Attorney's Liability for Officers' Fees. Cases are cited for the liability of the attorney for the fees of the sheriff and his clerk and other court officials. Some American cases show the contrary. An attorney is not liable for witness fees, nor is he liable to a stenographer for services performed at his request.

The Chivalry of the Law, by LEOPOLD LEO. A collection of cases upon the right of a husband to an action against one who deprives him of the *solamen et consortium* of his wife, and upon seduction and breach of promise of marriage.

Ibid.—25th August, 1883.

Oral License to Flow Land. Concluded in the following number. Authorities, English and American, are cited showing that where an oral license is given upon which expense is incurred by the licensee, the license cannot be revoked, at least not without a tender of expense incurred.

Force as a Defence of Real Estate, by E. F. PALMER. The right of a person to defend his own house with force is discussed. The right of persons to enter the lands of others without being liable for trespass is then dealt with.

Ibid.—8th September, 1883.

Common Words and Phrases. Continued in the following number. Side ; spirituous liquors ; capital ; author ; store and store fixtures ; Gulf of Mexico ; furniture ; front of one acre ; fraud ; spirituous liquors ; used with a view to profit ; are defined.

American Law Review—May-June, 1883.

Practice in cases of Foreign Extradition, by SEYMOUR D. THOMPSON. A very able and exhaustive review.

Fraudulent Mortgage of Merchandise—*Robinson v. Elliott*, further examined, by JAMES O. PIERCE. "The doctrine announced in *Robinson v. Elliott*, 22 Wall. 513, may be briefly stated thus: that a mortgage or other conveyance of a stock of goods in trade, made to secure a *bona fide* indebtedness, if coupled with an agreement reserving to the mortgagor the partial control of the goods, with the privilege of disposing of them at discretion, in the usual course is fraudulent and void as to the other creditors." The learned writer then subjects the doctrine to a close criticism citing English and American cases.

Trial by Jury, by MATTHEW P. DEADY. A short introductory history of the origin and uses of juries leads to the pointing out of the defects in the system in the United States.

Actions on Judgments, by W. P. WADE. The subject is treated under the following heads:—Domestic judgments; judgments of sister States; authentication; the effect of judgments of sister States; pleading in actions on judgments of sister States; foreign judgments; the effect of foreign judgments.

Implied Warranty of Fitness of a Chattel, by CHARLES A. BUCKNAM. *Brown v. Edgington*, 2 Man. & G. 279, is cited, where it was held that when a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied. Other English and American cases to the same effect are noted. Cases of purchases of goods to arrive, and by sample, are then dealt with, all being cited as illustrative of the principle that where the purchaser cannot exercise any skill or judgment of his own but relies on that of the vendor, there is an implied warranty by the latter that the article is fit for the purpose for which it is intended.

Central Law Journal—1st June, 1883.

Civil Liabilities of Lunatics, WILLIAM L. MURFREE, Sr. English and American cases are cited.

Contributory Negligence of Infants, by ADDISON G. MCKEAN. "The earlier rule was said to be, that when the plaintiff was a child of tender years, it was no defence to an action of negligence to prove that the child contributed to the injury. * * Later, in England, it was held that the principle of contributory negligence should be applied to all cases whether the plaintiff can be considered of age to know what he is doing, or otherwise."

Ibid.—8th June, 1883.

Commissions of Real Estate Agents, by MURAT W. HOPKINS. "The general doctrine may be said to be, that the employment of a real estate agent to sell, does not mean that he is to sell, convey and receive payment; * * when he has performed all that is compatible with his employment, he has executed his part of the contract." Where an agent is employed to sell at a fixed figure it has been held that he can offer himself as the purchaser at that price, whereupon he is entitled to the commission. Numerous cases are cited.

Termination of the Liability of a Common Carrier, by F. M. BIXBY. Does a common carrier's liability, as such, close the moment the merchandise is unloaded from the cars and deposited in the company's warehouse, or does it continue until the consignee has had a reasonable time to examine and take away goods? In Massachusetts the Railway company become warehousemen upon depositing the goods in their freight house. Cooley, J., held, however, that the companies did not divest themselves of their original character merely because they provided the necessary and convenient sheds for their business as carriers. In Connecticut it has been held that the liability as carriers exists till the consignee has had a reasonable time to take away the goods.

Ibid.—22nd June, 1883.

Donatio Mortis Causa, by HARRIS RICHARDSON. Numerous English and American cases are cited.

Ibid.—6th July, 1883.

Married Women's Debts, by JOHN F. KELLY. The American laws are considered.

Ibid.—13th July, 1883.

Mistake of a Legal Right, by CHARLES A. BUCKNAM. Ignorance and mistake, says the learned writer, have been confused. "In most cases of mistake it has appeared that error consists in some element necessary to a contract which was never present to perfect a binding obligation; while those where ignorance of the law is only shown, all the elements of contract appear from the facts in evidence, and in both of them a *bona fide* intention negatives the idea of fraud."

Ibid.—20th July, 1883.

Surface Water on Agricultural Lands, by W. W. THORNTON. Concluded in the following number. Numerous English and American authorities are cited.

Ibid.—27th July, 1883.

Expectancy, Conveyance of—Release, by WILLIAM H. BEAVEN. Cites a number of cases upholding such transactions.

Irish Law Times—10th March, 1883.

Criminal Attempts, continued and concluded in two following numbers. A narration of the circumstances of *Regina v. Delaney*, a prosecution for an attempt to shoot Mr. Justice Lawson, and a discussion of the points involved in that case and *Regina v. Brown*.

Ibid.—31st March, 1883.

Damages done by Animals during Transit through Highways, continued and concluded in six following numbers. The "ox case," *Tillett v. Ward*, forms the text, the circumstances being set out. Authorities are cited to show that the owner of animals in which property exists is bound to keep them from straying into the property of another. Addison and Smith are cited for the proposition that a person on a highway having a dangerous instrument in his hand, or driving a dangerous animal must exercise more care than others. Rolle's Abridgment, Comyns' Digest and the Year Books are cited for that it is trespass for the beasts of a stranger to enter one's land from the highway. A number of cases are then cited respecting the damage done by various animals, not the least surprising and peculiar of which is an action by the owner of a thoroughbred heifer for damages for her seduction by a low bred bull, in which the plaintiff got a verdict which was upheld.

Ibid.—19th May, 1883.

The Privilege of Counsel and Solicitors Acting as Advocates, concluded in the following number. A review of English, Irish and American cases.

Ibid.—9th June, 1883.

Contracts on Unread Conditions. Some cases are cited showing that the parties are bound, except in cases mentioned by Stephen, J., in *Watkins v. Rymill*, L.R. 10 Q.B.D. 178; 52 L. J. Q. B. 121.

Ibid.—16th June, 1883.

Contracts in Restraint of Marriage, continued and concluded in three following numbers. A number of English, Irish and American cases are discussed.

Ibid.—14th July, 1883.

Liability for Overholding by Under-tenants. When there is a demise of premises the tenant is impliedly, if not expressly, bound to deliver up possession on the expiration of his term, and therefore, if his undertenants refuse to quit, he will be liable to his landlord for their overholding, as well as for the costs the landlord may incur in obtaining the clear possession. Several cases are cited.

Law Journal.—14th April, 1883.

The Law of Libel in the Lords. In *The Capital, etc., Bank v. Henty*, reported in the April number of the *Law Journal Reports*, the

defendants, brewers, had issued a circular to their tenants that they would not receive the cheques of the bank in payment of rent, whereupon the plaintiffs brought an action for libel. The jury disagreed, and a motion was made by the defendants to enter judgment for them. This was refused; on appeal this was reversed and in the House of Lords affirmed, Lord Penzance dissenting. "Before the present case there can be no doubt that the prevailing opinion among lawyers was, in regard to the respective provinces of the judge and of the jury in an action for libel or slander, that it was for the judge, if called upon, to decide whether the words were capable of the defamatory meaning suggested, and for the jury to decide whether, under the circumstances of the case, they actually bore that meaning. * * The decision, we think, adds considerably to the certainty of the law of libel, while it almost destroys the quasi-legislative functions of the jury, which in all branches of the law are nowadays altogether on the wane."

Ibid.—21st April, 1883.

Collision between two ships of the Carrier of Cargo.

Where two ships of the same owners collided, both being at fault, and a cargo of specie was lost in one, the High Court gave a verdict for the whole amount of the loss, holding that the defendants were liable in contract for the loss sustained. This was reversed on appeal, the Admiralty rule as to damages when both ships are at fault being applied, and half of the loss only being awarded. "The decision, it should be remembered, only goes to the extent that a carrier by sea is not liable in contract for negligence on board a ship of his, other than the carrying ship, in respect of collisions in mid-ocean. The same rule would hardly apply to collisions coming in and going out of port."

The Law as to "Ocmmorlontes." In *Elliott v. Smith*, reported in the April number of the *Law Journal Reports*, a testator left three sums of money to his two natural children and his housekeeper respectively, and declared that "in the event of any of the aforesaid dying" then their legacy should go to the others named. The residue was to go to the same three persons. The testator and his housekeeper were together on board the "Princess Alice" when she sank in the Thames. Both were drowned, and there was no evidence which died first. Three rules apply. First, that a legatee who dies before the testator loses his legacy. Second, that the next of kin are, *prima facie*, entitled to the goods of a dead person, and a legatee who would oust the next of kin finds the burden of proof upon him. Third, when two persons die together, without evidence which survived the other, there is no presumption of survivorship.

Ibid.—5th May, 1883.

Discovery in Ejectment. *Lyell v. Kennedy*, reported in the May number of the *Law Journal Reports*, is discussed. "It has been decided that interrogatories in ejectment are *mutatis mutandis* on the same footing as interrogatories in any other form of action; but no rule has been laid down at all trenching upon the claims of privilege most applicable to that

form of action. For example, the rule that a man cannot be forced to produce his documents of title is not infringed by the decision; neither is the principle that one party cannot insist on looking at his opponent's brief. It is merely laid down as a general doctrine that there may be discovery in ejectment, and that the doctrine that a plaintiff must recover on the strength of his own title, not on the weakness of the defendant's, has no application, as has been very generally supposed."

Ibid.—12th May, 1883.

Costs on the Recovery of a Balance. *Lowe v. Holme*, reported in the May number of the *Law Journal Reports* is discussed. "The rule therefore seems to be that, when the defendant overtops the plaintiff by a counterclaim, he will have the costs of the action if the dispute is practically one thing, but otherwise if there are two disputes. The rule is not imperative, because, after all, the basis of it is a discretionary power, and it is subject, when the case is tried by a jury, to an application being made at the proper time; but the tendency of the day is strongly in this direction. * * If the litigant who overtops his adversary is generally to have costs, irrespectively of the character of the various items in dispute, injustice will often be done. But the true rule is, in fact, the opposite. The successful party in regard to a particular head of claim or counterclaim ought to have his costs in respect of that claim or counterclaim independently of his failure or success as to the rest, except in those cases in which claim and counterclaim are practically the same thing, when the victor in point of figures may claim the costs."

Ibid.—19th May, 1883.

The Limitation Act for Mortgagees. *Sutton v. Sutton*, reported in the May number of the *Law Journal Reports* in which it was decided that twelve years is the period of limitation in regard to mortgages, whether the mortgage is enforced against the land or against the mortgagor personally, is discussed. See *Allan v. McTavish*, 2 App. R. 278.

Ibid.—26th May, 1883.

The End of the Transitus. A discussion of *Kendall v. Marshall*. Goods having been bought, the vendees instructed the vendors to send them to Marshall & Co., at Garston. They at the same time instructed Marshall & Co. to send them on to Darend & Co., at Rouen. The vendors were not made aware of the fact that the goods were to go beyond Garston. They were stopped at Garston on the vendees becoming bankrupt. Mr. Justice Mathew held that the *transitus* had not ended, but his decision was reversed by the Court of Appeal.

Ibid.—9th June, 1883.

Injunctions under the Judicature Acts. *The North London Railway Co. v. The Great Western Railway Co.*, is discussed, where an injunction to restrain an arbitration was refused. *Malmesbury Railway Co.*

v. Budd, 45 L. J. Rep. Ch. 271, *Bedow v. Bedard*, 47 L. J. Rep. Ch. 589, *Healey v. Bates*, 49 L. J. Rep. Ch. 170 and *Astlatt v. The Mayor and Corporation of Southampton*, 50 L. J. Rep. Ch. 31 are criticized.

Ibid.—16th June, 1883.

The Judicature Acts and Inferior Courts. *Pryor v. The City Offices Company*, reported in the June number of the Law Journal Reports, is discussed. It was decided that the Judicature Acts do not apply, as regards procedure, to inferior Courts. Some other cases on the subject are noted.

Bankrupt Executors as Clients. In *Hannay v. Basbane*, reported in the June number of the Law Journal Reports, it was held that a defaulting executor who during the pendency of an administration action against him had become bankrupt, was not entitled to his costs after the bankruptcy until he had made good his default.

Ibid.—23rd June, 1883.

Insurance between Contract and Completion. *Castellain v. Preston*, reported in the June number of the Law Journal Reports, is discussed. *Rayner v. Preston* decided the question as between vendor and purchaser. The present case decides the rights between the vendor who has received the full purchase money from the purchaser, and the insurer who has paid to the vendor the amount to the extent of which the property was damaged. It is now decided that the insured, under such circumstances, having in fact lost nothing, is bound to return the money to the insurer.

Discovery under the Judicature Acts. *Humming v. Williams*, 52 L. J. Rep. Q. B. 273 and 52 L. J. Rep. Q. B. 400, is discussed. The action was brought to recover penalties for acting as a vestryman after becoming disqualified as a contractor with the vestry. It was held that interrogatories could not be administered nor could discovery of documents be obtained.

Ibid.—30th June, 1883.

Counter-claims without Claims. *McGowan v. Middleton*, reported in the June number of the Law Journal Reports, is discussed. It was held that when the plaintiff discontinues there is no reason why the subject matter of the counter-claim should not be tried.

Ibid.—7th July, 1883.

Distress Damage Feasant. In *Green v. Duckett*, reported in the July number of the Law Journal Reports, the question was whether the owner of a bull which had strayed and done damage, could recover from the distrainer money paid under protest, in satisfaction of an exorbitant claim for the damage done by the bull. The right was upheld in a County Court and the decision affirmed on appeal. "We gather from this case

that, if the owner tender amends before there has been an impounding in a public pound, and pay an exorbitant demand under protest, he can recover the difference from the distrainer."

The Responsibility of Trustees. A trustee intending to invest money in corporation securities, being ignorant that he could obtain them from the corporations, employed a broker to buy for him. On receipt of a bought note from the broker he paid over the money on request. The broker absconded, and neither securities nor money were forthcoming. It was held that the trustee was not liable. "Brokers, apparently, frequently obtain corporation securities for their clients from the corporations themselves. If Mr. Gaunt had known this, it might have made a difference in the result; but it is clear that, as an ordinary man of business he was not bound to know it. The ordinary way of investing in securities of this kind is to employ a broker. Mr. Gaunt did employ a broker and paid over the money to him in the ordinary course of business. The Court of Appeal, in the character of a jury, say that his act did not amount to negligence, and the decision will be accepted as the only sound conclusion admissible on the proper premisses."

Ibid.—14th July, 1883.

Doctrine of Cumber v. Wane. *Beer v. Foakes* is discussed. An agreement to take the bare amount of a judgment by instalments was made. The plaintiff subsequently claimed interest on the judgment. It was held by the Q. B. Division that there was a sufficient consideration for the agreement, but this was overruled by the Court of Appeal.

Ibid.—18th August, 1883.

The Abatement of Personal Actions. *Young v. Wallingford*, reported in the August number of the Law Journal Reports, is discussed. A solicitor procured the plaintiff to lend money on property partly freehold and partly leasehold, by representing that it was freehold and that his loan would be a first charge. The solicitor himself held a first mortgage on the land. The interest was regularly paid till his death, when the fraud was discovered. It was held that there was no action for the misrepresentations against the executors, but the solicitor's mortgage was postponed to the plaintiff's. "The point of law with which Vice-Chancellor Bacon mainly dealt is the question whether the maxim *actio personalis moritur cum persona* applies to this kind of misrepresentation. * * The Vice-Chancellor accordingly dismissed the claim for damages on the ground that it was not maintainable against the executors, although it might have been maintained against the testator. In regard, however, to the mortgage already held on the property by Hamlin, he directed that this mortgage should rank after the client's, thus holding the solicitor to the truth of the representation which he had made to his client, so far as his own acts were concerned."

Ibid.—25th August, 1883.

Non-riparian use of Water. *Ormrod v. Todmorden Joint Stock Mill Company*, reported in the July number, and *Kensit v. Great Eastern*

Railway Co., reported in the August number of the Law Journal Reports are discussed. In the former it was held that the defendants, who were not riparian proprietors, and who with the leave of a riparian proprietor took water out of the stream and returned it somewhat diminished, were liable in damages to the plaintiff a riparian proprietor. In the latter it was held that under a similar state of facts where there was no diminution of water there was no cause of action, nor would an injunction lie. "The decision in Ormerod's case had this in common with the decision in Kensit's case, that in both it was laid down or assumed that a riparian proprietor cannot transfer his rights to a person who is not a riparian proprietor. Such a grant, if made, is only good as between grantee and grantor. * * These two last cases proceed on the assumption that the only person who has rights in a stream as against all the world, up and down the stream, is the occupier of land on the banks of the stream."

Western Jurist—June, 1883.

The Question of Jurisdiction in Transitory Actions Arising in Foreign States. ANONYMOUS. A short review of English and American cases.

Ibid.—July, 1883.

Interest of Beneficiary in Life Insurance Policy, by EMLIN McCLAIN. After a review of the cases the learned writer concludes, "Therefore, it seems to follow, in reason and by weight of authority, although contrary to the two or three late cases cited above, that the mere fact of taking out a policy of insurance payable to another, as a gratuitous benefit intended to be conferred, and not in pursuance of any legal obligation, and also, without any assignment or delivery of the policy to the beneficiary, does not vest any interest in such beneficiary or constitute an executed gift or settlement. The transaction may be likened to the purchase by one person from a bank of a certificate of deposit payable at a future date to the order of another. If the sum mentioned in the certificate be intended as a mere gratuity to the payee, it would hardly be claimed that before the instrument was delivered to him, or any action had been taken on the faith thereof, the purchaser could not by consent of the bank, cancel the certificate or procure another in its place payable to some one else."

THE
CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[WILSON, C.J., 14TH SEPTEMBER, 1883]

McKNIGHT v. CITY OF TORONTO.

Municipal By-Law—Nuisances—Prohibition against keeping swine and cows—Validity of.

By R. S. O. cap. 174, sec. 466, s-s. 17, as amended by 44 Vict. cap. 24 sec. 12, under the sub-heading "nuisances," it is enacted that the Council of every city, etc., may pass by-laws for preventing or regulating the erection, etc., of slaughter houses, etc., which may prove to be nuisances "including the keeping of cattle and pigs or swine, and cattle or cow byres and piggeries." Pursuant to this the defendant's council passed a by-law which by section 2 provided that "no person shall keep, nor shall there be kept within the city of Toronto any pig or swine, or any piggery."

Held, that the by-law was *ultra vires* as being a general prohibition against the keeping of pigs, and not being restricted to cases that might prove to be nuisances.

By section 3, s-s. 2 the by-law provided that no cow should be kept in any stable, etc., situate at a less distance than forty feet from the nearest dwelling house, and where two cows are kept that the stable should be not less than eighty feet from the nearest dwelling house.

Held, that it was unnecessary to declare expressly that the keeping of cows within such distances was, or might be, a nuisance, but that the prohibition was in effect such a declaration; that the distances prescribed were reasonable; and that the by-law as to that was unobjectionable.

Semble, that it was not bad in being so generally expressed that it restricted the owner from keeping cows within the prescribed distances of his own dwelling house, and

Held, that this objection not being clear should not at any rate be allowed to the applicant whose case was not within the terms of the objection.

Read, Q.C., for the applicant.

McWilliams, for the City of Toronto.

[18TH SEPTEMBER, 1883.]

In re WOLVERTON AND THE TOWNSHIPS OF NORTH AND SOUTH GRIMSBY.

*High School District—By-laws annexing parts of two Municipalities—
Repeal.*

In 1879 the township of Grimsby passed a by-law attaching a certain portion of the township to the village of Grimsby for high school purposes. In 1881 the same council similarly annexed another portion. Corresponding by-laws were passed by the village of Grimsby. By 45 Vict. cap. 33, the township of Grimsby was divided into the townships of North and South Grimsby. In 1882 the council of the township of Grimsby passed a by-law on the petition of less than two-thirds of the ratepayers repealing the two former by-laws.

Held, that the two township by-laws with the corresponding village by-laws formed an agreement, pursuant to R. S. O. cap. 205, sec. 30, as amended by 42 Vict. cap. 34, sec. 32, which could not be rescinded by one of the municipal bodies without the concurrence of the other.

Held, also, that the repealing by-law should be passed only upon the petitions of two-thirds of the ratepayers.

Aylesworth, for the motion.

Muir, contra.

[28TH SEPTEMBER, 1883.]

In re CAMERON, A SOLICITOR.

Solicitor's undertaking to produce client—Failure to produce—Liability of Solicitor.

It was alleged that a solicitor whose client had been summoned to be examined as a judgment debtor in a Division Court action, gave a verbal undertaking that if the summons was enlarged the judgment debtor would appear to be examined at the next Court. During the enlargement the judgment debtor disposed of his property and left the country, and a motion was made to compel the solicitor to pay the debt and costs.

Held, that the undertaking did not impose on the solicitor any liability, other than the duty to produce his client at the Court on the day of its sitting.

Semble, that the solicitor's pecuniary liability on his undertaking would amount only to the expense which the creditor might be put to by attending at the time and place of the adjournment, if the debtor failed to appear, though other damage might possibly be proved.

The undertaking having been denied by the solicitor for the debtor the motion was dismissed.

Aylsworth, for the motion.

Cattanach, contra.

[OSLER, J., 31ST JULY, 1883.]

In re THE CANADA ATLANTIC RAILWAY CO. & THE
TOWNSHIP OF CAMBRIDGE.

Municipal Corporation—Railway Aid—Debentures—Mandamus.

Held, following the decision of the Supreme Court of Canada in *Re Grand Junction Railway Co. v. Town of Peterborough*, (not yet reported), that a writ of mandamus to compel the issue of debentures by a municipal corporation, under a by-law in aid of a railway, will not be granted upon motion, but the applicant must bring his action.

McCarthy, Q.C. and *Gormully*, for the applicants.

MacLennan, Q.C., contra.

[CAMERON, J., 4TH SEPTEMBER, 1883.]

STAR KIDNEY PAD CO. v. GREENWOOD.

*Sale of medicinal composition—Representation as to curative properties—
Discovery of ingredients.*

Action on a promissory note given by the defendant to the plaintiffs in payment for a quantity of pads made by the plaintiffs, and said to possess curative properties when applied to the body. The defence was that the note was obtained by fraud, and that the pads purchased were useless, and possessed no healing properties. The defendant demanded production and discovery of the formula or recipe from which the goods were made in order to show that they were valueless, which the plaintiffs refused on the ground that no representation was made as to their ingredients, that the composition was a secret not patented, and that discovery would injure them in their business.

Held, that the defendant was not entitled to the discovery.

Bethune, Q.C., for the plaintiff.

Osler, Q.C., for the defendant.

[4TH SEPTEMBER, 1883.]

BANK OF BRITISH NORTH AMERICA v EDDY.
UNION FORWARDING CO. v. EDDY.

These actions were commenced in the Chancery Division, and upon a jury notice being given they were transferred to a Common Law Division as being proper cases to be tried by a jury. On the trial the jury disagreed.

Bethune, Q.C., and *A. Ferguson*, for the plaintiffs, now moved to dispense with a jury on the ground that one jury had disagreed, and that the cases were of such a nature that a jury would not be likely to agree.

McCarthy, Q.C., and *Holman*, contended that the question of whether or not a jury should try the cases was *res judicata* by reason of the transfer to a Common Law Division for the purpose of a jury trial.

Cameron, J. dismissed the motion.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 12TH SEPTEMBER, 1883.]

CAMPBELL v. MCKERRACHER.

Parol agreement respecting lands—Part performance.

In order to induce the Court to compel specific performance of a parol agreement required by the Statute of Frauds to be in writing, evidence of acts of part performance done by the plaintiff must be given; they must be such as to manifest from their nature that there is some contract between the parties touching the land in question.

[15TH SEPTEMBER, 1883.]

In re WETHERELL v. JONES.

Constitutional law—Taking evidence in Canada for use in foreign country
—*International comity—31 Vict. cap. 76 (D.).*

Held, that the subject matter of 31 Vict. cap. 76 (D.), which provides for taking evidence in Canada, in relation to civil and commercial matters pending before Courts of Justice in other of Her Majesty's Dominions, or before foreign tribunals, is not one pertaining to or connected with the administration of justice in the Provinces, nor to civil rights in the Provinces, but is a matter of international comity, and therefore the Act is *intra vires*.

[PROUDFOOT, J., 6TH JULY, 1883]

KITCHING v. HICKS.

Chattel mortgage—Present and after acquired goods—Registration—Right of assignee to attack—Creditors' right to attack.

The plaintiff claimed under an unregistered agreement whereby the then present and future stock in trade of H. was transferred as security against the payment of accommodation paper made by the plaintiff's testator for H.

Held, that though when such an agreement affects goods to be acquired *in futuro* only, it does not require registration, yet when it covers present as well as future acquired goods it must be registered, and therefore this agreement was void for want of registration.

Held, following *Parke v. St. George*, 2 O. R. 342; 3 C. L. T. 35, that the agreement could not be attacked by an assignee in trust for creditors, but that creditors of H., who were defendants, might ask to have it declared void, so that the goods might fall into the assignment.

[19TH JULY, 1883.]

MCGREGOR v. KEILLOR.

Trespass to land—Conventional boundary—Limitation of actions—Evidence—Notes of deceased surveyor.

Adjoining proprietors had a boundary line run between them by a surveyor, who staked and blazed his line through the bush on the lands, and for more than ten years they each observed the line so run, and exercised acts of ownership up to the same, but never crossed it until the defendant, having had a new line run, claimed a strip thereby taken from the plaintiff's land, and entered upon it.

Held, that the plaintiff's possession, according to the blazed and staked line, for ten years before the trespass complained of, satisfied the statute of limitations, and that he was therefore entitled to a perpetual injunction to prevent the defendant from crossing the line.

In giving evidence as to the original survey of the Township, the field notes of S., a surveyor, were tendered, S. being dead. It appeared that S. had been employed to fix the boundaries of the Canada Company's lands in the Township, and he had in his notes made a memorandum of having found an old post which would aid in ascertaining the true line between the parties hereto. None of the lots mentioned in his memoranda were shown to be Canada Company lots, nor was it shown that there were any such lots in the concession in which the lands in question herein lay.

Held, that the memoranda were not made by S. in the execution of his duty and therefore that they were inadmissible.

IN CHAMBERS.

[WILSON, C. J., 28th SEPTEMBER, 1883.]

DONOVAN v. BOULTBEE.

Postponement of trial—Notice of trial.

By a verbal order made at the sittings of assizes, the trial of the action was "postponed to the autumn assizes." The Record remained in the hands of the Clerk of Assize, and at the next assizes the cause was placed upon the docket for trial, but no notice of trial was given.

Held, reversing the judgment of the Master in Chambers, that the cause, on postponement of the trial, became a *remanet*, and that no notice of trial was therefore necessary.

Upon the return of the notice of motion in appeal it appeared to be a short notice by leave of the Master in Chambers.

Held, that he had no power to shorten the time on a motion not returnable before himself. By consent the motion proceeded.

H. J. Scott, Q. C., for the appeal.

Donovan, contra.

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In re CRAIG.

Mechanics' liens—Mortgage—Priority—Vendors and Purchasers Act—Specific performance—Practice.

When building has been commenced on land, and after the commencement of the building the land is incumbered by mortgage, and after the mortgage mechanics' liens are registered on the land, the mortgages and lien holders take in order of priority of registration, under sec. 4, s-s. 3, of the Mechanics' Lien Act.

When an application has been made under the Vendors and Purchasers' Act for the opinion of the Court upon questions arising out of the contract, an action of specific performance is thereafter improper, and all further applications thereon should be made under the Act.

The Real Estate Loan and Debenture Company put up for auction the land in question under the power of sale in a mortgage in default, and Craig became the purchaser. In making title it appeared that a number of mechanics' liens had been registered, which the purchaser demanded the removal of by the vendors before completing his purchase, alleging that they took priority of the mortgage to the extent of the improved value of the land. A petition under the Vendors and Purchasers Act was then presented by the Company to have the question of priority settled.

It appeared that the vendors' mortgage was dated on the 8th of March and registered on the 9th of March, 1882; that when the mortgage was made there was existing on the land a mechanic's lien, dated 22nd Novem-

ber, 1881, registered the same day; and there were in the sheriff's hands several executions against the mortgagor's land. The mortgage contained a clause to the following effect: "Provided that the money hereby secured shall be advanced only upon the certificate of the mortgagees' valuer, and shall be actually expended in the erection of houses, etc., upon said lands. The mortgagor agrees to pay his workmen and material men, and to indemnify and protect the mortgagees and the priority of this mortgage against the operation of any liens, which if registered shall not prevail in priority over this mortgage to any extent whatever."

Prior in date, but subsequent in fact, to the mortgage of the Real Estate Loan and Debenture Company there was a mortgage made on the lands to the Hon. J. B. Robinson, which was completed and registered on the 6th of April, 1882. The covenants for title in this mortgage were qualified by excepting the mortgage to the Real Estate and Debenture Co. On 1st July, 1882, a third mortgage was made to Craig, the purchaser, and registered on the 8th July, 1882.

At the time of advancing the mortgage money upon the first mortgage, the mechanics' lien-holder and the execution creditors then existing entered into an agreement under seal, whereby they agreed to postpone their liens and executions to the mortgages of the Real Estate Loan and Debenture Company, and the Hon. J. B. Robinson.

During the progress of the work on the buildings a number of mechanics' liens were registered, all being subsequent in date and registration to the registration of the third mortgage.

A. C. Galt, for the vendors, the first mortgagees, contended that by virtue of the clause in the mortgage no mechanic's lien could take priority over it. The Mechanics' Lien Act, R. S. O. cap. 120, sec. 3, declares that "Unless there is an express agreement to the contrary," every mechanic, etc., shall have a lien. Here there was an express agreement to the contrary; and the mortgagees having a title free of liens, can convey to the purchaser free from them. He cited *Forhan v. Lalonde*, 27 Gr. 600.

E. Douglas Armour, for the second mortgagee. The agreement against liens contained in the first mortgage enures to the benefit of the second mortgagee. The registering of a mechanic's lien being a proceeding *in rem*, the agreement not to register a lien operated in relief of the land, and not as between the parties to the agreement only. Then, the fact that there was a mechanic's lien registered before the first mortgage shows that the work had commenced when the first mortgage was given. That being so, the mortgages take priority over the liens, for section 7 of the Act gives priority to liens only in case the work is done on land already incumbered at the commencement of the work. In this case all the mortgages became charges on the land after the work had commenced, therefore the lien holders take as purchasers with other incumbrances under the Registry Act, by section 4, s.-s. 3 of the Mechanics' Lien Act, that is according to their priority in the Registry Office. He cited *Douglas v. Chamberlain*, 25 Gr. 288; *Richards v. Chamberlain*, *Ibid.* 402.

W. Nicholas Miller, for the purchaser, claimed that the liens should be

removed by the vendors, or that the purchaser should be allowed to discharge them out of the purchase money.

Snelling and J. H. Macdonald, for various lien holders.

PROUDFOOT, J., 21st May, 1883, held that the incumbrances, *i. e.*, the mortgagees, execution creditors, and lien holders, took according to priority of registration, and made the following order:—Order purchaser to carry out his contract and pay the purchase money forthwith. 2. The vendors, after deducting their mortgage debt and costs, to pay into Court the balance, and thereby be discharged from all liability in respect of the sum so paid in. 3. The surplus so paid in to be paid out, first, in payment of second mortgage; second, in payment of execution creditors, according to priority; third, in payment of the third mortgage; fourth, in payment of the lien holders, according to their priority. 4. The parties to add the costs of the application to their several claims.

The purchaser failed to complete his contract pursuant to this order.

A. C. Galt now moved, on notice to the purchaser, for an order to compel him to complete his contract within a limited time, otherwise that the vendors might be at liberty pursuant to their contract and conditions of sale to re-sell, declare forfeit the deposit already paid, and charge the present purchaser with the loss on re-sale, if any. He argued that an action was unnecessary, and in fact improper; and that the matter once having come before the Court, under the Vendors and Purchasers Act, this application was properly made. He cited *Thompson v. Ringer*, 44 L. T. N. S. 507.

FERGUSON, J., 17th September, 1883, made an order that the purchaser carry out the contract within fourteen days; if he should fail to do so, that the vendors be at liberty to re-sell pursuant to the terms of their contract and conditions of sale, the present purchaser to make good the loss, if any, and to pay the costs of this motion.

[WILSON, C.J., 29TH OCTOBER, 1883.]

RAMSAY v. THE MIDLAND RAILWAY CO.

Discovery—Railway Company—Examination of Station Master.

In an action for not delivering goods received by the defendants for carriage upon a shipping receipt, signed by a station master,

Held, affirming the order of the Master in Chambers that the station master was liable to examination before trial under the Common Law Procedure Act.

Clement, for the plaintiff.

Aylesworth, for the defendants.

[FERGUSON, J., 24TH SEPTEMBER, 1883.]

WEBSTER v. LEYS.

Appeal from Master's report—Time—Computation of.

A notice of appeal from the report of the Master in Ordinary was served on Monday the 17th September, for Monday the 24th September. On the return of the notice,

Kingsford moved to set it aside and strike the case off the paper, on the ground that the notice should have allowed seven clear days to intervene between the day of service and the return day. He argued that G. O. 642 which prescribes the seven days notice had been interpreted by *Hayes v. Hayes*, 8 P. R. 546; 1 C. L. T. 283, and required seven clear days notice. This had become the practice of the Court of Chancery. By Rule 3 this order so interpreted was incorporated in the present practice. It was therefore excluded from the operation of Rule 456. He cited *Rumohr v. Marx*, 3 C. L. T. 31.

Black, contra, contended that Rule 456 applied, and that, in the computation of the seven days, the day of giving the notice should be excluded but the return day should be included; the notice was therefore good. He cited *Harper v. Marx*, 3 C. L. T. 309.

FERGUSON, J., after examining the rules and authorities cited, ruled against the objection, holding that Rule 456 applied, and that the notice given was sufficient.

[24TH SEPTEMBER, 1883.]

EDWARDS v. PEARSON.

Taxation of costs—Costs disposed of by order—Disallowance on taxation—Rule 442.

The Master in Chambers made an order to amend the writ and proceedings, the costs to be costs in the cause. The plaintiff, having succeeded in the action, claimed the costs of the amendment allowed by the order in taxing his costs of suit, which the taxing officer refused to allow, ruling that he could, under Rule 442, exercise his discretion to disallow costs which he thought were improperly incurred.

Held, reversing this ruling, that the taxing officer had no discretion, but was obliged to tax the costs as ordered, and that Rule 442 refers to the moderation of costs not disposed of by express order or judgment.

Black, for the appeal.

Hoyles, contra.

[THE MASTER IN CHAMBERS, 24TH SEPTEMBER, 1883.]

VANDUSEN v. JOHNSON.

Close of pleadings—Notice of Trial.

The plaintiff issued his writ against several defendants, but served only one. The pleadings were closed with the defendant served.

Holman, moved to set aside the notice of trial, on the grounds that the pleadings were not closed, citing Rules 176 and 255.

Hoyles showed cause.

Held, that the plaintiff by not having proceeded against the defendants other than the one served must be assumed to have abandoned as against them, and that the pleadings were therefore closed, and notice of trial was regular.

[29TH SEPTEMBER, 1883.]

SYKES v. CANADIAN PACIFIC RAILWAY CO.

Security for costs—Action by executor of foreign testator.

The plaintiff took out probate in Ontario of the will of a testator who resided and died in England, under a power of attorney from the English executors, in which capacity he brought this action.

Held, that the defendants were not entitled to an order for security for costs.

G. F. Harman, for the plaintiff.

Knowles (Cameron & McPhillips) for the defendants

NEW BRUNSWICK.**Supreme Court.**

[MARCH, 1883.]

REGINA v. COREY.

[Crown Case reserved.]

Criminal Law—False pretences.

The prisoner wrote to the prosecutor to induce him to buy counterfeit bank notes. The prosecutor, in order to entrap the prisoner and bring him to justice, pretended to assist the scheme, arranged a meeting of which he informed the police, and had them placed in position to arrest the prisoner at a signal from the prosecutor. At such meeting the prisoner produced a box which he said contained counterfeit bank notes, which he agreed to sell the prosecutor on payment of a sum agreed upon. The prisoner gave a box to the prosecutor, which he pretended to be the one containing the notes, who then gave the prisoner \$50 and a watch as security for the balance which he had agreed to pay.

The prosecutor immediately gave the signal to the police and seized the prisoner and held him until they arrested him, and took the money and watch from him. On examining the box given the prosecutor, it was ascertained that the prisoner had not given him the one containing the notes, as he pretended, but a similar one containing waste paper. The box containing the notes was found on the prisoner's person. It was clear and undisputed that the motive of the prosecutor in parting with the possession of the money and watch, as he had done, was to entrap the prisoner.

The prisoner was found guilty of obtaining the money and watch of the prosecutor by the false pretence of giving him the counterfeit notes which he did not give.

On a case reserved for the opinion of the Court,

Held, by Allen, C.J., and Palmer, J., that in order to complete the crime of obtaining property by false pretences, there must not only be the false pretence, but an actual parting, and intention to part with the property of the party imposed upon by the pretence; that the prosecutor here never intended to part with his property in the money and watch, and that the conviction should be quashed.

They were also of opinion that, as the prosecutor only expected to receive from the prisoner counterfeit notes, which were of no value, it was extremely doubtful whether he could be said to have been defrauded because he received worthless goods of another kind.

Held, by Weldon, Wetmore, King, and Fraser, JJ., that the prisoner was rightly found guilty, and that the conviction should be affirmed.

[APRIL, 1883.]

POWELL v. HANINGTON.

Judge's order—Copy of—Made rule of Court.

A Judge's order may be made a Rule of Court, on production of a copy of it served on the party moving, verified by affidavit.

Ex parte STEEVES, *et al.*

Civil Court of the Town of Moncton—Review from—Affidavit for—Before whom sworn.

An affidavit for review from a judgment in the Civil Court of the Town of Moncton should be sworn before one of the parties mentioned in Con. Stat. cap. 58, sec. 7.

Ex parte COOK.

Review from Justice's Court—Remitting cause to Justice to enter up judgment.

On review from a Justice's Court, the County Court Judge is not required to enter up judgment, but may remit the cause to the Justice before whom it was tried to do so.

Doe dem. BRIDEAUX v. BUDREAU.

*Statute of Limitations—Tenant by courtesy—Right of entry in heir—
When it accrues.*

A son has no right of entry in land of which his mother died seised, during the lifetime of his father, who has the right to possession as tenant by courtesy, and the Statute of Limitations will not run against him until his father's death.

 SNOWBALL v. MUIRHEAD.

Arbitration—Costs of—Power of Court to review.

Where an order for reference to arbitration made at *Nisi Prius* provided that the costs of the arbitration should be taxed by the Clerk as costs in the cause, the Court has no power to review the Clerk's allowance of the costs of the arbitrator.

 WORRALL v. BRIDEAU.

Review—Jurisdiction—Court not legally constituted.

A Judge has no power under Con. Stat. cap. 160, sec. 43, to review a judgment, where the person before whom the proceedings were had, had no authority to hold any Court.

 DORSAY v. CONNELL.

*Husband and wife—Chose in action—Assignment by husband and wife—
Administration in different countries.*

A married woman being entitled to a share of money in England, joined with her husband in a power of attorney to the defendant, an attorney at law, authorizing him to collect it. They afterwards assigned their interest in the money to A.; but before it was collected the wife died, and administration to her estate was granted in England to N. as attorney for the husband, and for his use and benefit. N. collected the money and sent it

to B. in this Province, who paid it to A. by direction of the husband. There was some evidence to connect the defendant with the receipt of the money by B. The husband afterwards died, and administration to the estate of his deceased wife was granted in this Province to the plaintiff, who brought this action for the money received from England.

Held, (1) That the right to the money in England being a *chose in action*, the assignment to A. did not vest the property in him, but merely transferred to him any right the husband had. (2) That N. having collected the money as administrator of the wife it belonged to him as such administrator, and the defendant receiving it was only liable to account to N., and was not liable for it to the personal representative of the wife in this Province.

Where administrations are granted in different countries, each portion of the estate must be administered in the country in which possession of it is taken and held under lawful authority: and the administrator under a foreign grant has a right to hold the assets received under it against the home administrator even after they have been remitted to the country of the domicile of the deceased.

MANITOBA.

In the Queen's Bench.

[TRINITY TERM, 1883.]

BLEASDELL v. TOWNSEND.

*Constitutional law—Preferences by insolvents—Con. Stat. Man. Cap. 37.
sec. 96—Validity of.*

Con. Stat. Man. cap. 37, sec. 96, enacts that "in case any person being at the time in insolvent circumstances, or unable to pay his debts in full,

or knowing himself to be or in fact being on the eve of insolvency, makes or causes to be made any gift, conveyance, assignment or transfer, of any of his goods, chattels, or effects, or delivers, or makes over any bills, bonds, notes, or other securities of property, with intent to hinder, defeat or delay the creditors of such person, or any of them, or with intent of giving one or more of the creditors of such person a preference or priority over his other creditors, or over any one or more of them, every such gift, conveyance, assignment, transfer or delivery, shall be null and void as against the creditors of such person."

Held, in an interpleader issue to determine the rights of a chattel mortgagee who had obtained a preference from a debtor, that the above enactment was *intra vires* of the Provincial Legislature, the enactment not being of the nature of a bankrupt or insolvent Act.

Killam, for claimant, the mortgagee.

Howell, for execution creditors.

(Reported by W. E. Perdue, Esq., Barrister-at-Law.)

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EXPATRIATION.

III. Referring now to the United States we find that, up to the time of the recent change in their law, to be hereafter mentioned, the executive government was not only in controversy with several of the Governments of Europe as to the right of expatriation, but that it was actually in conflict with the law of their own country as laid down by their most eminent legal authorities, including Judges of the Supreme Court at Washington; that while they insisted that the naturalization of foreigners in the United States divested them of their original nationality, and should be so regarded by the Governments to which they had formerly owed allegiance, they failed to put themselves right or to amend their own law so as to authorize their own citizens to put off their allegiance to the United States, in a manner that the Government would be bound to recognize as effectual. Some of the authorities alluded to will now be mentioned.

In 1817, Mr. Justice Washington, an Associate Justice of the Supreme Court, expressed himself as follows:—"I must be more enlightened upon the subject of allegiance than I have yet been before I can admit that a citizen of the United States can throw off his allegiance to his country without some law authorizing him to do so." And further on, in the same case, he speaks of "the perpetual allegiance" due by a man to the country in which he was born (*a*).

(*a*) *The United States v. Gillies*, Dall. 310.

In the earliest years of the Republic attention was directed to the subject. In 1795, one of the Judges of the Supreme Court of the United States said, "A statute of the United States relative to expatriation is much wanted, especially as the common law of England is by the constitution of some of the States expressly recognized and adopted" (b).

It is worthy of remark that as early as 1792 the example of passing an expatriation law was set by the State of Virginia, which expressly authorized expatriation as follows:—"Whenever any citizen of this Commonwealth shall" (*prescribing formalities*) "declare that he relinquishes the character of a citizen and shall depart out of this Commonwealth * * * he shall be considered as having exercised his right of expatriation and shall thenceforth be deemed no citizen" (c).

Upon this it may be remarked, however, that in so far as such a law purported to affect citizenship of the United States it would have been considered *ultra vires* of a State legislature, and that such a power belonged only to the Federal jurisdiction, which, however, did not follow that example until the year 1868, when the question was dealt with by Congress.

In the case of *The Santissima Trinidad*, in 1821 (d), the abstract question of the alleged natural right to dissolve the connexion between an individual and his country seems to have been brought under the notice of Chief Justice Marshall, but that distinguished Judge deemed it unnecessary to the decision of the case before him. And in the same case, on appeal to the Supreme Court, Mr. Justice Story merely referred to the question, but gave no opinion upon it at that time (p. 347). But in a later case (1890) that eminent jurist, in delivering the opinion of the Supreme Court of the United States, said, "the general doctrine is that no person can by any act of their own, without the

(b) *Talbot v. Fansen*, 3 Dall. 154.

(c) Dall. p. 136 n.

(d) *Brackenbrough*, 478.

consent of the Government, put off their allegiance and become aliens" (e).

In 1856, Mr. Attorney-General Caleb Cushing, summing up a review of the cases relating to expatriation, said, "It is a significant fact at all events that on many occasions where the question presented itself, not one of the Judges of the Supreme Court has affirmed, while others have emphatically denied the unlimited right of expatriation from the United States" (f).

Chancellor Kent says, "From an historical review of the principal decisions in the Federal Courts, the better opinion would seem to be, that a citizen cannot renounce his allegiance to the United States, without the permission of Government, to be declared by law; and that, as there is no existing regulation on the case, the rule of the English common law remains unaltered" (g).

Another distinguished American lawyer, the late Attorney-General Black (formerly one of the Justices of the Supreme Court of the State of Pennsylvania), said, in 1859, in an official opinion, "The executive government have always claimed an unlimited right of expatriation for the subjects of all other countries, but when, within the last few years, the question presented itself in the Supreme Court, not one of the Judges affirmed, while several denied the right for its own citizens" (h).

And it would seem that the Executive gave practical effect to such denial in the case of *Elijah Clarke*, mentioned in a note to Sir F. Baker's edition of General Halleck's book "as a native of the United States who was hanged by the Americans as a traitor in 1812, though he set up the defence that he was an alien, having been domiciled in Canada" (i).

IV. After the conclusion of the Treaty of Ghent and general pacification of Europe, those British subjects who

(e) *Shanks v. Dupont*, 3 Pet. 242.

(f) Op. Att'y-Gen. vol. viii. p. 157.

(g) *Kent's Comm.* 12th ed. vol. ii. p. 49.

(h) Op. Att'y-Gen. vol. ix. p. 356; and see *Halleck's Int. Law*, p. 195.

(i) *Halleck's Int. Law*, p. 359, citing *Bracken. Miscell.* 409.

had been taken prisoners in the impressment from American ships in the war of 1812, and sent to England to be tried as traitors, were liberated; and it does not appear that the British Government has practically enforced the legal rule of indelible allegiance since that time, or indeed laid claim to the allegiance of any one who has practically expatriated himself (*j*).

Indeed, the learned Chief Justice Draper, in the case of *Reg. v. McMahon* (*k*), already referred to, clearly points to the relaxation of the rule as follows:—"It might have been objected that the more liberal views of modern times seem to recognize a right in every freeman to elect, not merely his place of domicile, but his sovereign, or government, and with his person transfer his allegiance also, and that the Court should not fetter such right with the antiquated doctrine of allegiance by birth being indestructible by the act of the subject."

The Royal Commission were unanimous as to the expediency of establishing the new principle of modern times, allowing a man to change his nationality, Earl Clarendon, the chairman, stating, in the House, that the main object of the commission had been to consider whether, as regards British subjects, they should still retain their nationality, although they may have acquired naturalization in another country. It was perfectly true, he said, that the old common law doctrine had fallen into desuetude, and long since ceased to be put in practice; but it stood greatly in the way of any legislation with regard to naturalization; and the commissioners were unanimously of opinion that it ought to be abolished. They say, he continued, quoting from the Report, that, "The allegiance of a natural born British subject is regarded by the common law as indelible. We are of opinion that this doctrine of the common law is neither reasonable nor convenient. It is at variance with those principles on which the rights and duties of a subject should be deemed to rest; it conflicts with that freedom of action which is now recognized as most conducive to the

(*j*) Cockb. p. 30.

(*k*) 26 U. C. R. 195.

general good, as well as to individual happiness and prosperity; and it is especially inconsistent with the practice of a state which allows to its subjects absolute freedom of emigration. It is inexpedient that British law should maintain in theory, or should by foreign nations be supposed to maintain in practice, any obligations which it cannot enforce, and ought not to enforce if it could; and it is unfit that a country should remain subject to claims for protection on the part of persons who, so far as in them lies, have severed their connection with it" (*l*).

Lord Stanley, speaking of the steps which had been taken by the previous government of which he had been a member, said, "We thought moreover that the change which we proposed, and which the bill is the means of carrying out, was not so much a concession to any American claim or demand as a step taken in our own interest, with a view of relieving ourselves from duties which we had no means of discharging, and of abandoning nominal rights which it was not in our power to make use of. The fact was that from 1796 to the present time this question has been an almost constant subject of dispute and controversy between England and the United States" (*m*).

Lord Chief Justice Cockburn, in 1868, in the treatise already referred to, reviewing and summing up the results of the labours of Her Majesty's Commissioners as set forth in their report and appendix, and referring to the naturalization by one State of the subjects of another when the latter refuses to relinquish its hold on their allegiance, remarked that this was for more than half a century a cause of discord between Great Britain and the United States, and led to controversies as to which Her Majesty's Commissioners say, "Commencing from the first establishment of the American Union, they continued with unabated vigor until the present day (1868), when the great increase in the number of persons settled in the United States had raised them to a position of the utmost importance" (*n*).

(*l*) Parl. Deb. 1870.

(*m*) Ibid.

(*n*) Cockb. Nat. pp. 69, 70.

As to the numbers referred to it is stated in Mr. Wheaton's Treatise (o), that it was estimated in 1868 that upwards of six millions had emigrated to the United States since 1790, and that they and their descendants numbered more than twenty millions; and upon this it is remarked by that learned author that "the position of the government was therefore most anomalous, if that number of its subjects owed allegiance to foreign states." It may be mentioned that from that time up to the present the numbers have constantly increased. The census of 1880 and other statistical reports show that the United States have been receiving from European countries an average immigration of half a million per annum. By that census it appears that there were over six and a half millions of persons of foreign birth then settled in the United States; and of these vast hosts, about two and three quarter millions were born in the United Kingdom, and 717,157 in Canada.

During the American civil war, 1861-1865, when conscription Acts were passed by Congress, difficult questions frequently arose by reason of persons residing there claiming exemption from military service on the ground that they were British subjects, and invoking the protection of the British Government.

As to this, Earl Carnarvon remarked that "Experience of the late civil war in the United States had shown that under the present law persons who had acquired a double nationality would desire to obtain the advantages of both, while accepting the burdens of neither" (p).

The inconvenience of the rule was further exemplified when the protection of the United States Government was demanded by Europeans who had emigrated to the United States and become naturalized according to the laws in force there, and then returned to their native country and became amenable for acts committed against its laws. Other causes of controversy are referred to more fully in Sir F. Baker's edition of Gen. Halleck's Work on Inter-

(o) Wheaton's Int. Law, 2nd ed. p. 206.

(p) Parl. Deb. 1870.

national Law, and Boyd's edition of Wheaton, and in Cockburn on Nationality.

Lord Chancellor Hatherley, in introducing the Imperial Bill in the House of Lords, was careful to point out the distinction between Naturalization and Nationality, saying as to the latter, "it could only be dealt with by treaty, when we had brought ourselves so completely *en rapport* with other nations that we could agree upon some common system of legislation. All that Great Britain could do meanwhile was to take a step in the right direction—in the direction proposed by the Bill—and thus induce other nations to act similarly" (q).

The controversy, so far as Great Britain and the United States were concerned, was settled in the most amicable manner. A Protocol, dated 9th October, 1868, was signed by the Minister of Foreign Affairs, Earl Derby, and Mr. Reverdy Johnson, the American Minister in London, the effect of which was to pledge the Government of the country to bring before Parliament the question of naturalization, and on behalf of the Crown, and subject to the sanction of Parliament, to accept as a basis of legislation the principle that citizens of the United States naturalized in England, and British subjects naturalized in the United States, should be reciprocally free, on certain conditions, from their native allegiance" (r). Upon the Bill being passed,—*i.e.*, the Naturalization Act, 1870,—a treaty was signed, viz., the "Treaty of Naturalization between the British Government and the United States, of May 13, 1870," embodying the principle above referred to, establishing reciprocal relations upon the subject in question between the two nations. This was followed by a supplemental treaty, signed May 4, 1871.

The question of expatriation occupied the attention of the United States Congress in 1868. Sir Alex. Cockburn (pp. 104, 105) notices that during the debate several members (Messrs. Wilson, Woodward and Pile,) who took part in it,

(q) Ibid.

(r) Parl. Deb. 1870.

challenged attention to the fact that while the promoters of the measure were aiming their attacks against Great Britain on account of its law relating to allegiance, the American law remained unaltered; Mr. Woodward proposing to insert a clause providing for the expatriation of Americans becoming domiciled abroad, on the ground that when they (the American people) were asking foreign governments to make provisions in their behalf for expatriation of their citizens, it was quite indispensable that they should begin by providing for the expatriation of their own citizens.

On the 27th July of that year, an Act was passed with a preamble containing the following declaration:—"Whereas the right of expatriation is a natural and inherent right of all people indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign States, owing allegiance to the Governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disallowed: therefore any declaration, instruction, opinion, order or decision of any officer of the United States which denies, restricts, impairs or questions the right of expatriation is declared inconsistent with the fundamental principles of the Republic:"—as to which Sir R. Phillimore observes that it, of course, "cannot be considered as one of international law, because one State has thought proper to incorporate it into its own law" (s).

It, however, defines very clearly the views of Congress on the subject. And an official opinion has been given by Hon. G. H. Williams, Attorney-General of the United States, upon this declaration, to the effect that it comprehends citizens of the United States as well as those of other countries; and where a citizen of the United States

(s) *Phill. Int. Law*, 2nd ed. vol. iv. p. 30.

emigrates to a foreign country, and there, in the mode provided by its laws, formally renounces his American citizenship, with a view to become a citizen or subject of such country, this should be regarded by the United States Government as an act of expatriation " (t).

As between Great Britain, with her dominions, and the United States, however, expatriation is governed by the treaties above mentioned, taken in conjunction with provisions in the naturalization laws.

V. It now remains to notice the provisions of the Canadian Act authorizing expatriation, which in fact is that consent of the Sovereign, under the sanction of Parliament, without which, as we have seen, it was impossible for a British subject to put off his allegiance. Section 8 (sec. 6, Imp. Act) provides that "any British subject who has at any time before, or may at any time after the passing of this Act, when in any foreign State and not under any disability, voluntarily become naturalized in such State, shall from and after the time of his so having become naturalized in such foreign State, be deemed within Canada to have ceased to be a British subject and be regarded as an alien."

And to prevent persons being taken by surprise by the change in the law the right is given to any who have been naturalized abroad previous to the passing of the Act, and who, according to the previous law, were then still British subjects, to choose within two years whether they would remain foreign subjects or reclaim their citizenship in this country (sec. 9, s-s. 1).

The Act contains provisions for other special cases, made in pursuance of the same principle, viz., in secs. 5 and 7; also a provision for "Repatriation" (secs. 20, 23), whereby a British subject, who has become an alien by virtue of the Act, called a "Statutory Alien," may resume his original character, and obtain a certificate of re-admission to British Nationality through as many alternations of nationality as the person may desire. Upon the debate already referred to, Earl Carnarvon "doubted whether, if the

(t) Opin. Att'y-Gen. vol. xiv. p. 295 (1873).

citizenship of a great country like that was really a precious possession, a man should be able to take it on and put it off as if it were an old garment *toties quoties* according as suited his convenience; and suggested that a man should not be at liberty to return to his original nationality more than once" (u). This suggestion, however, was not adopted; the "Statutory Alien" being entitled under the provision just mentioned to apply upon the same terms and subject to the same conditions as required in the case of an alien by birth.

In making this provision however, as in the provision of sec. 9, s-ss. 1 and 2, above referred to, regard is had to international law, and the rights of foreign governments over acquired subjects are respected by the qualification that "within the limits of the foreign state of which the person became a subject he shall not be deemed to be a British subject within Canada, unless he has ceased to be a subject of that foreign State according to the laws thereof, or in pursuance of a treaty or convention to that effect. The claims of international law are also respected in making the provision for conferring the quality of a British subject upon an alien, the qualification being added that "he shall not when within the limits of the foreign State of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject, unless he has ceased to be a subject of that State in pursuance of the laws thereof, or in pursuance of a treaty or convention to that effect (sec. 17), evidently because the British Government will not assume responsibility for the conduct of any acquired subjects within their country of origin unless they have been expatriated with the consent of the Government of that country.

A. HOWELL.

(u) Parl. Deb. 1870.

THE STATUTE OF LIMITATIONS AS A CONVEYANCER.

The effect of the Statute of Limitations upon estate of a person whose title has been barred by a trespasser has been variously stated. It is not an uncommon thing to speak of the land as having been transferred to the trespasser by a parliamentary conveyance. There are other more cautiously expressed opinions as to the operation of the statute, but none of them are completely satisfactory. Indeed, even Lord St. Leonards has differently expressed himself at different times, and in such manner that if full weight be given to the literal effect of his words, entirely different results will be arrived at.

We propose to collect some of the authorities on the subject and examine them; and without further attempting to elucidate the point at issue, to present it for consideration.

Under the old law the right to the estate was not, but the remedy for the recovery of the estate was, extinguished; and so, it is apprehended, that, if a rightful owner regained possession without an action, after the expiration of the statutory limit during which a stranger had been in possession, he would have been remitted to his former title and estate.

The change worked by the Imperial enactment, 4 Wm. IV. cap. 27, which was reproduced in Upper Canada, and now exists in R.S.O. cap. 108, was a radical one. By section 4 of our Act the remedy was disposed of after the lapse of ten years. By section 15 of the same Act it was declared that, at the determination of the period limited by the Act for making the entry or bringing the action, the right and title of such person to the land or rent should be extinguished. So completely is the original owner divested of his title by

the operation of this section, that a re-entry by him, after the lapse of the statutory period, will not operate as a remitter so as to revive his former title (a). His title is completely extinguished, and there is nothing left for him to assert by action, nor has he any claim to maintain possession if he regains it.

This disposes of the "right and title of such person to the land," to use the words of the Act. But the question remains, In whom is the title now to be found? In whom has the estate of the person barred been vested? Does the statute convey his estate? Does it transfer anything?

In *Doe d. Jukes v. Sumner* (b), there is an expression of Baron Parke's at the end of his judgment, which has occasioned a good deal of criticism. The learned Baron said, "The effect of the Act is to make a parliamentary conveyance of the land to the person in possession after that period of twenty years has elapsed."

In *Court v. Walsh* (c), Boyd, C., said, in speaking of a case between mortgagor and mortgagee, "Therefore, it is not merely a loss of the claim, but it is a divesting of the title, or a transfer of the title to somebody else. * * At the end of ten years * * the title of the mortgagee to the lands was extinguished, and by virtue of the statute a parliamentary re-conveyance was made to the plaintiff as assignee of the equity of redemption."

Again, Lord Selborne, L. C., in *Heath v. Pugh* (d), in discussing the effect of the clause respecting mortgages, said, that "instead of the equitable estate of the mortgagor being forfeited to the mortgagee, the whole right, title, estate, and interest of the mortgagee would be transferred to the mortgagor."

Similar expressions have dropped from Lord St. Leonards; but, as we have hinted already, his Lordship's expressions of opinion have varied to some extent.

(a) *Brassington v. Llewellyn*, 27 L. J. Ex. 297; *Court v. Walsh*, 1 Ont. R. 167.

(b) 14 M. & W. 42.

(c) *Supra*.

(d) L. R. 6 Q. B. D. 364.

In *Incorporated Society v. Richards* (e), he says, "There is a marked distinction between the old Statute of Limitations and the present one. The former statute only barred the remedy, but did not touch the right; possession at all times gave a certain right; but under the new Act, when the remedy is barred the right and title of the real owner are extinguished, and are, in effect, transferred to the person whose possession is a bar."

But in another report (f) of the same case, this eminent judge is reported to have said, "Under the new Act, possession gives the right, and not only gives the right, but transfers the estate. All former statutes barred the remedy, but did not bar the estate; they did not create an estate, though they enabled the party to hold against all the world. But the new statute, in point of fact, gives the estate to recover which the remedy is barred, for it bars the remedy, and binds the estate."

So in *Scott v. Nixon* (g), he says, "Where can the right be but in the person whose possession the statute prevents from being interrupted. I am clearly of opinion that by the effect of the statute, after the proper period of limitation has passed, the legal fee simple is in the party who has been in possession during that period, and that he is competent to convey it to another." And again, at page 407, "It was said in this case, that the statute of limitations only operated as a defence, but never could be held to confer a title, and I was asked, where, or in whom, was the legal title? I reply, that the statute has executed a conveyance to the party, whose possession is a bar. The statute makes the title, for by its operation it extinguishes the right of one party, and gives legal force and validity to the title of the other, the party in possession."

Though these opinions vary but slightly in expression, it will be seen upon closer observation that they differ largely in meaning.

(e) 1 Dru. & W. 289.

(f) 1 Con. & L. 85.

(g) 3 Dru. & W. 405.

From these cases, we deduce the following theories as to the operation of the statute:—It is (i) a parliamentary conveyance of the land; (ii) a re-conveyance to the mortgagor; (iii) it transfers the estate; it is (iv) a transfer of the title; (v) a transfer of the right, title, estate, and interest; (vi) it gives legal force and validity to the title of the disseisor.

These theories may be classified as follows:—(a) Number (iv) refers to the title exclusively; (b) numbers (i) and (ii) relate to the land itself, the subject matter of tenure, the subject matter of title; (c) number (v) relates to the title and estate; (d) number (iii) relates to the estate in the land exclusively; (e) number (vi) is *sui generis*, and erects the precarious fee of the disseisor which originated in a wrongful possession into a good statutory title.

All but the last agree in conveying the notion of a passing of some interest or right from the owner to the disseisor, and all but the last are therefore open to criticism. Let us consider each.

(a). Those opinions which speak of the transfer of the title to the disseisor appear to be the most objectionable. If it were the case that the title were transferred to the disseisor, he would, in making title to a purchaser, claim through the person whose title had been barred. He would represent himself as having been invested with the title of which the disseisee had been divested. He would be obliged to show, and make out, the paper title down to the dispossessed owner, and then make out that title as vested in himself by the operation of the statute. This is not the case either in theory or in practice. The disseisor claims *against* the paper title. He must, it is true, exhibit the paper title, but as negative evidence only, *i. e.*, for the purpose of showing that all persons claiming by the paper title have been barred, and not for the purpose of showing that it has vested in himself. His positive evidence of title is the possession which has extinguished the paper title; that is the root of his title, and on that alone his title depends. Most clear and expressive is the statement of the statute's

operation made by Strong, J., in *Gray v. Richford* (h). "The statute of limitations is, if I may be permitted to borrow from other systems of law terms more expressive than any which our own law is conversant with, a law of extinctive, not one of acquisitive prescription; in other words, the statute operates to bar the right of the owner out of possession, not to confer title on the trespasser or disseisor in possession. From first to last the statute of 4 Wm. IV. says not one word as to the acquisition of title by length of possession, though it does say that the title of the owner out of possession shall be extinguished, in which it differs from the statute of James, which only barred the remedy by action, but its operation is by way of extinguishment of title only."

The title, by the very words and meaning of the statute, becomes extinct at the expiration of the statutory limit, and therefore cannot be transferred to, or survive or revive in, the disseisor. He cannot succeed to what does not exist.

(b). When we speak of a conveyance of the land to the disseisee it involves the notion of conferring a benefit upon him. Now the statute has not for its object the conferring of any benefit upon a wrong doer; it has no such immoral object in view. Nor is there in it, as Strong, J., has pointed out, a vestige of a doctrine of acquisitive prescription. It is negative in its operation.

A conveyance also involves the notion in our law of investing the grantee with some estate in the land, which must necessarily be marked out, limited, or defined by the terms of the conveyance. Yet there is nothing whatever in the statute which we can lay hold of to furnish any indication of the nature or extent of the estate supposed to be conveyed to the disseisor.

Again, suppose the land to be limited to A. for life, remainder to B. in fee. A. is dispossessed, and his title becomes extinguished by the possession of the disseisor. Though the negative operation of the statute upon the title

(h) 2 S. C. R. at p. 454.

is complete as to A., there is no positive conveyance of the land to the disseisor; for it must still follow the limitations of the settlement. If not fallacious for the reasons first given, this opinion is at least defective in being too general in its terms.

(c). The remark of Lord Selborne, as to the disposition of the title and estate, may be relegated to the criticism of the theories classed in (a) and (d).

(d). With respect to the passing of the estate of the dis-
seisee to the disseisor, questions of the greatest intricacy arise. Take again the example of an estate to A. for life, remainder to B. in fee. A. is dispossessed, and his title finally becomes extinguished. This effectually disposes of his right and remedy. Having no title to his former estate, he has no estate left in him. Where, then, is the estate? Is it in the disseisor, who thereby becomes tenant *pur autre vie*? Or has it, as well as the title, become extinct?

If it is in the disseisor, the statute does not begin to run against the remainderman until the death of the dispossessed life tenant. If it has merely become extinct, and has not been transferred to the disseisor, there is no particular estate to support the remainder. The remainder, therefore, becomes an estate in possession, and the statute will begin to run against the remainderman as soon as the life tenant has been barred.

In the case put, Mr. Hayes says (i), "We must not, however, confound the negative effect of the statute with the positive effect of a conveyance. In the example last considered, the rights of A. and B. do not become the rights of C. [the disseisor], under a species of involuntary alienation effected by the statute. If that hypothesis were adopted, it would follow that when the bar was complete as against A., the tenant for life, C. acquired a lawful estate *pur autre vie*; in short, that where the land is in settlement, the adverse holder would be from time to time invested with the lawful interests of the successive takers. Such is *not* the

(i) 1 Hayes Conv. 268.

operation of the statute. The wrong-doer must be considered, according to the principle of the old law, as claiming generally, and therefore as claiming the whole interest, (unless, indeed, he expressly qualify his claim), and the statute as merely diminishing from time to time the danger of eviction, till at length his originally precarious fee becomes, by the exclusion of every stronger claim, a firm inheritance."

The conclusion which we draw from this distinguished writer is that the trespasser never has any estate, until all those entitled under the limitations in the settlement are barred. He has nothing but possession of the land. But he points out that he has a *right* to possession. And, in the passage immediately preceding the above quotation, he distinguishes between the right of possession and the right of property. "The distinction," he says, "between the right of possession and the right of property is now reduced to this: that though the right of possession may be in one person, as against *strangers*, and the right of property be in another, yet the right of property can exist no longer as a mere right, but only in connection with a right of entry." In the case put, then, the disseisor has a right of possession only, and that as against *strangers*. There is no right of property in the life tenant whose title has been extinguished; he has no right of entry. Therefore the right of property must be in the remainderman. But the right of property cannot exist, says the learned writer, except in connection with a right of entry. Is not this a *present* right of entry? If it is not, then we have a future estate of freehold which does not await the determination of any prior estate. It is supported by a possession and a right of possession only—a conclusion which is contrary to the fundamental principles of law, with which the statute does not profess to interfere. The conclusion from this is either, that the disseisor must have an estate *pur autre vie*; or, that the remainder is accelerated by the extinction of the life estate, and becomes an estate in possession as soon as the life tenant under the settlement is barred.

Apply another test. The land is occupied by successive

independent trespassers, for a sufficient length of time to extinguish the title of the life tenant; but no one of these trespassers has been in possession long enough to obtain a statutory title. As against the life tenant, the last of the trespassers can defend his possession (j). But has he any estate? Plainly not. He has not even that right of possession which Mr. Hayes speaks of, for he may be ejected by the first trespasser (k). If there is a right of possession in the first trespasser, (for he has no estate), why should it be measured by the life of the dispossessed life tenant, who is now a total stranger to the title? Even if it were so to be measured, it would not be sufficient to support the remainder, being but a right of possession as against strangers. Suppose the land to be vacated by the last of the trespassers. Is the remainderman to remain out until the original life tenant dies? Suppose, again, that after the last of the trespassers leaves the land, the original life tenant re-takes possession. Can the remainderman eject him? Can the sometime life tenant now set up his old title under the settlement? Surely not, for that title has been extinguished. Can he then defend his possession, on the ground that he has a right to trespass on the land for the remainder of his own life? We should say not.

And so, a learned writer in the *Jurist* says (l), "The right and title of the tenant for life are extinguished, and not transferred. If they were transferred, they would be transferred with the charges on them. So that if A. were lessee for life at a rent, C. [the disseisor] would not, under the notion of a parliamentary conveyance, be liable in debt for the rent as assignee. The estate of A. has determined: has not that determination of the particular estate accelerated the remainder? The remainder is all that is left of the fee, after deducting the particular estate; and a remainder must always have a particular estate to support it, although it is sufficient if the estate be

(j) *Kipp v. Incorporated Synod*, 33 U. C. R. 220; and see *Doe d. Carter v. Barnard*, 13 Q. B. 945; and Dart. V. & P. 5th ed. 403.

(k) 1 Hayes' Conv. 268.

(l) 11 Jur. N. S. 152.

a right of entry, without actual entry. The remainderman, then, being entitled, subject to the life estate, must have the right of entry when that life estate, which was the only impediment to his possession, has ceased by whatever means; and a lessor who has parted with the right to the possession of his land to a tenant for life, cannot be kept from re-entry, after that right has ceased by a mere wrong-doer."

Mr. Dart is also of opinion that there is no conveyance of the estate (*m*).

(*e*). The theory which leaves the statute exhausted in its *operation*, upon extinction of the paper title, and refers the title of the disseisor to his possession alone as the *effect* of the operation of the statute, has been adopted by Mr. Darby (*n*), who says, "It is apprehended however that it may more strictly be said that its operation in giving a title is negative; it extinguishes the right and title of the dispossessed owner, and leaves the occupant with a title gained by the fact of possession, and resting on the infirmity of the right of others to eject him."

The *operation* of the statute, then, is to extinguish the paper title, and the *effect* of that operation is to leave some one in possession who cannot be disturbed for want of a title in any other. There is in this view no other title to the land than that which is evidenced by the possession. And the disseisor's title must therefore have its origin in his possession; it is in fact correctly described as a title by possession.

This is also the view of Mr. Hayes, who calls the disseisor's possession a "precarious fee," until the last claimant under the paper title is barred; but he does not account for the particular estate in the meantime.

(*m*) V. & P. 5th ed. 402.

(*n*) Darby Lim. 389.

EDITORIAL REVIEW.

Registrars' Fees—McNamara v. McLay.

We have received a long communication from a correspondent on the subject matter of *McNamara v. McLay*, ante, p. 449, containing some criticism of the case itself.

We do not think that any good purpose will be served by publishing it. This sometime troublesome Registrar is now Registrar no more, and his doings in the past are by-gones.

Touching the case itself, we do not think it will be of any great practical use. We say this with all due respect for the Court which decided it, and without intending to reflect in the slightest upon the judgments delivered. We refer solely to the fact, which is patent to every one who reads the requisitions which were made to the Registrar, that these requisitions were, one and all, framed entirely in the interest of the Registrar. Of the three requisitions referred to in the first holding of the Court, there is not one that a solicitor ever makes, or probably would think of making to a Registrar. Our correspondent makes one point with reference to the requisition, "To inform what incumbrances, if any, appeared in the books affecting the title," which is worth noting. It is this. The Registrar was asked a question which he was not bound to answer. No fee is provided by the Act for such services, and therefore no fee should have been allowed. In fact, the service performed was an illegal one; for the Registrar being asked whether a piece of land was incumbered, was in effect asked to advise on the title. He did advise upon the title by declaring the land incumbered, against the express prohibition of section 19 of the Registry Act. And yet he was permitted to receive a fee for his services.

The other requisitions are rarely if ever made, with the exception of the requisition to exhibit the abstract index.

Fortunately this is seldom refused; and we believe the case has never directly arisen since the Act of 1865, as to whether a party desiring a search is entitled to inspect the abstract index, although it has indirectly arisen where there has been a dispute as to the amount of fees chargeable.

We contend strongly for the right of the public to see the abstract index. The Act of 1865 was the first Act which made registration *per se* notice; it was the first Act which required an abstract index to be kept; it was the first Act which required the Registrar to exhibit the books of office. Surely there is some connection between the making of registration notice and the direction to the Registrar to exhibit the books. When registration was not notice, it mattered little whether the public had access to the books or not. Now that it is *per se* notice, and now that the public are to see the books if they demand it, is this index, which is the only guide to the title that there is in the office, and the most important book, to be withheld? Are the persons interested in a piece of land to be bound by every instrument registered, and yet not see the record of the registered title? To withhold this book would be to put the party searching entirely at the mercy of the Registrar. It may be said that the dangers of mutilation, etc., pointed out in *Re Webster and the Registrar of Brant*, 18 U. C. R. 87, still exist, and are such that the books should not be subjected to them. But is not this illusory? The searches are made in presence of the Registrar, and mutilation would hardly be possible without being followed by immediate detection—to say nothing of the unlikelihood of such things being done by solicitors. Much greater is the danger to an original instrument as to which the argument applies with much more force. A document might easily be torn, or concealed about the person, during inspection, without the same danger of detection that there would be in an attempt to mutilate or alter a large book. Finally, is not the abstract index one of the books of office which the Registrar is bound to exhibit? Section 28 of the Act of 1865 (23 of the present Act) provides that the Registrar shall exhibit the original instrument “and also the books of

the office *relating thereto*." Is this a book of the office relating to the original instrument? Under the head-line "Books of Office" we find section 33. It directs the Registrar to keep the abstract index; "and *every instrument registered* * * and the name of every such person to *each instrument*, and the *nature of it* * * the numbers of registrations of all *such instruments* * * the day, month and year of their registration, and the consideration or mortgage money mentioned therein, shall * * be entered in regular order and rotation under the proper heading of each such separate parcel or lot of land mentioned in *such instrument* * *." The original instrument is mentioned four times in this section, and there are other references to it. The whole composition of the book relates to the registered instrument. The book is directed to be made up from the original instruments themselves; and not a word is said in the section as to the other books. The index is not auxiliary to the other books, nor is it made for the convenience of the Registrar. It is compulsory on him to keep it. How can it be said that this is not one of the books of the office relating to the registered instruments?

The Torrens System of Land Transfer.

We print at another page a letter, in which Mr. Holmsted, as one of the officers of the Canada Land Law Amendment Association, comes out in defence of the pamphlet which we criticised in our last number. We quoted from the pamphlet, "The study of the law of real estate is a recondite one, and even amongst the legal profession there are few who attain a complete mastery of the subject." And we added—"an assertion which receives ample proof from our author upon a perusal of his pages." Mr. Holmsted takes exception to this, and he is entitled to a retraction and apology from us, which we cheerfully give. The assertion *does not* receive ample proof from our author.

Again, we were mistaken in supposing that the pamphlet should have been read or criticised from a professional point

of view. It is said to have been intended for the perusal of ordinary people, and to contain only such statements as they could understand. We still believe the pamphlet to be defective in two important points, notwithstanding the expressed object for which it has been written. First, it does not point out the defects of the present system. Secondly, it does not show the excellencies of the Torrens system. It is true that it libels, in a general way, the law of real property, and lauds in a general way the proposed amendments thereto. It is taken for granted that every one knows exactly what the Torrens system is, and that it only wants a little judicious advertising to bring it into fashion. Some of the profession may understand the Torrens system thoroughly, and may be able to endorse all that is said about it, but we question much if the ordinary persons whom the pamphlet is intended to reach (including ourselves), will learn much about it from a perusal of the pamphlet.

Hodge, the farmer, is probably an ordinary person within the meaning of Mr. Holmsted's letter. Suppose him to open the pamphlet at page 14. He will learn that one of the benefits of the change will be the abolition of the estate tail, and no doubt he will be enlightened. The "protector of the settlement" he will probably associate with the Bully of the Clearing, a character the country would be well rid of. And when he sees the fee tail male and the fee tail female brought into juxta-position on the same page, he will agree that one of them at least ought to be killed in order to stop the breeding of any more issue in tail.

We think there are great difficulties in the way of introducing the system into the older Provinces of Canada. We do not say they are insuperable. But the more the Association vilify titles under the present system, and the more they exaggerate the difficulties at present in the way of making title to real property, the less likely are they to enlist people on the side of a system which would immediately subject every one of those titles to examination. They will rather leave things as they are.

We do not disapprove of the Torrens system. If it is needed let us have it. But let us know what it is before we are asked to take it.

Lex Talionis.

A firm of solicitors in Toronto, having rendered a bill of costs in the usual form to a somewhat facetious client, received in reply a contra account for carpentering done in their office, as follows :—

Sept. 10.—To receiving order for altering cupboard	\$ 25
Noting it in book	15
11.—Promising to do it	30
12.—Conveying promise to man in shop	05
15.—5 ft. lumber, etc	1 55
17.—Notice of work being done	25
Attg. for payment and relieving my mind of further responsibility	30
	<hr/>
	\$2 85

NOTE.—If paid at once, will accept \$1.55.

(Signed) _____.

The American Law Review on Canada.

Some one who is suffering from the after effects of cerebral excitement, caused by the visit of Lord Coleridge to the United States of America, deposits a quantity of mental filth on a page and a half of the *American Law Review*. It is evident that England is not the only country in which nincompoops originate, nor is Canada the only country which imports them. It is also abundantly evident that eminent abilities and deep learning will not beget gentleness in any one who is not born to it.

BOOK REVIEW.

Elements of the Law of Domestic Relations and of Employer and Employed. By IRVING BROWNE. Boston : Soule & Bugbee, 1883.

Condensation is more difficult than elaboration ; and a work undertaken as this one has been is therefore more open to criticism than a treatise would be which was somewhat more diffuse. Read by one fairly acquainted with the law, a condensed statement, or a succession of condensed statements, affords the desired information in a desirable form. But read by a novice, it is questionable whether the subject is not less grateful than a more elaborate treatment would make it. Of one endeavoring to master the elements of law, as little memorising as possible should be required. The principles of law barely stated are difficult to remember. If they are accounted for by a short narration of the history of their existence, or by keeping prominently in view the reasons for their existence, the memory is assisted in retaining them, and the mind takes wholesome exercise in analysing the process which is productive of the principle.

Our remarks refer to the method adopted, and must not be taken to refer to the manner in which the work has been done. It is clear and concise and contains abundant references to authorities, and comprises all the most prominent points essential to a knowledge of the laws treated of. When we see law books not only increasing in number but increasing in size, so that a treatise upon one subdivision of a subject will now be as large as a work on the whole subject used to be, it is refreshing to see some one trying to confine within reasonable limits the discussion of the essentials of knowledge.

CORRESPONDENCE.

Torrens System of Land Transfer.

To the Editor of the Canadian Law Times :

SIR,—As one of the officers of the Canada Land Law Amendment Association, and, as such, one of those responsible for the pamphlet you notice in no very complimentary terms in your last issue, I trust you will permit me to offer a word in its defence.

You appear to me to mistake the object the Association had in view in issuing the pamphlet in question. You style it a “treatise,” whereas all the Association intended it to be, was a popular statement intended for the perusal of ordinary people, and such as they would be capable of comprehending. Any attempt at a technical discussion of the question from a purely legal standpoint was considered under the circumstances inadvisable, considering the class of readers the Association chiefly desired to reach. How far it accomplishes the end the Association had in view I am content to let others judge.

You say, “ ‘The study of the law of real estate,’ says the writer of the pamphlet, ‘is a recondite one, and even amongst the legal profession there are few who attain a complete mastery of the subject,’ an assertion,” you add, “which receives ample proof from our author upon a perusal of his pages.” This is rather a cruel suggestion that the writer, assuming him to be a lawyer, poses as his own “dreadful example” of legal ignorance.

It would of course be a subject of regret that a pamphlet should be issued by any association professing to deal with an important question of law, which could justly be characterized as displaying ignorance of the subject with which it

professed to deal; and it would therefore have been more satisfactory to the Association if you had pointed out what you consider are those defects of learning which are so amply displayed in the pamphlet, in order that the Association might amend what is defective, should it think fit to continue the circulation of the pamphlet in question. Having perused it with some care, both before and since its publication, I confess I have been unable to discover any statement of law in it indicative of ignorance, with which you insinuate it abounds.

The pamphlet deals with two subjects. First, the desirability of facilitating the transfer of land by the introduction of Torrens' system of transfer; and, secondly—as a subsidiary matter, connected with, but not by any means essential to, the question of transfer—the amendment of the law of succession to land, so as practically to reduce all land to chattels real. If both schemes were adopted, then it is needless to say that it would involve the abolition of all those limitations which are now peculiar to land as distinct from chattels; but the result would not necessarily be, as you assume, that it would be impossible to limit estates in land so as to provide for thriftless and improvident people, and other unfortunate persons who require protection. By means of trusts it would be possible to effectuate such objects, just in the same way that personal estate is now dealt with, though of course the limitation of land in tail would no longer be feasible.

It is possible, however, to introduce the Torrens system of transfer without altering the present system of tenure. The Association's pamphlet urges a change to be made in both transfer and tenure, and it says in effect, what seems to me to be self-evident, that if you reduce all land to the state of chattels real, it will lead to the Statute of Uses, and the limitations known as remainders, cross-remainders, springing and shifting uses, executory devises and the law relating to entails, becoming obsolete.

In British Columbia the Torrens system of transfer has been introduced, but no change has been made in the law of tenure, which accounts sufficiently for the supposed

discrepancy between the anticipations of the Association's pamphlet and the present state of the law in that Province.

You think the remark made in the pamphlet, that on the introduction of the scheme advocated by the Association, "we should no longer have any necessity to resort to devices for barring the entail," is without much weight. It is possible, however, the writer may have had in view the fact that some people, resorting to the apparently simple device now in force for barring entails, have been under the impression that an entail has been barred by the simple conveyance you refer to, and have found to their cost that perhaps the deed was not registered within the required time, and that the entail has not been barred at all; or else that the consent of the "protector of the settlement" has not been obtained, and that merely "a base fee" has been created. Of course, it may seem a matter of no moment to get rid of these legal pitfalls, but I doubt the possibility of any one being able to show of what possible practical benefit they are to the land-holding community of this Province.

With regard to the supposed impracticability of introducing the Torrens system of transfer, it appears to me we have no greater difficulties to contend with than they must have had in Tasmania, for instance, where titles extended over sixty years. Those who would take that view of the matter remind me of the man who, being in gaol, consulted a lawyer as to his deliverance from durance vile, and having informed him of the cause of his incarceration, was told by the lawyer, "They can't put you in gaol for that." "But they have done it, and here I am," replied the unfortunate prisoner.

GEO. S. HOLMESTED.

REVIEW OF EXCHANGES.

Albany Law Journal.—29th September, 1883.

Abatement of Public Nuisance—Dwelling-house. Cases are cited showing that a private house which is used in such a way as to endanger public safety, as by propagating disease, may be treated as a public nuisance. The nuisance must be a physical, not merely a moral, one.

Ibid.—6th October, 1883.

Curiosities of Life Insurance Law, by LUCIUS McADAM. American cases are cited, of which the learned writer says, "The principle running through these cases seems to be that where the suicide is the result of accident or disease, the policy will not be avoided thereby." We suppose, because there would be no suicide in such cases. A creditor insuring his debtor's life, it is said, can only recover the debt. To avoid this, the debtor insures his life, and assigns to his creditor. We believe the English rule to be that the creditor is entitled to keep up the policy, even after payment of the debt, and can recover on it. Policies under statutes in favour of wife and children, free from claims of creditors, are not negotiable by the beneficiaries in New York. There are cases to the contrary in other States. Other branches of the subject are illustrated by the citation of cases.

Ibid.—13th October, 1883.

The Presumption of Continuance, by JOHN D. LAWSON. Rule 1. Possession of either realty or personalty, non-possession or loss, debt, and other conditions of property or things, once presumed to exist, are presumed to continue until the contrary is shown. Rule 2. Domicile, residence or non-residence, solvency or insolvency, infancy, partnership, the holding of an office, authority to do an act, and other relations of persons or things, once shown to exist are presumed to continue until the contrary is proved. These rules are illustrated by the citation of cases.

Ibid.—20th October, 1883.

Action for Malicious Prosecution of Mere Suit. Conflicting cases are cited. Some show that no action lies for the prosecution of a civil suit however unfounded, where there has been no damage to person or property; while there are weighty authorities to the contrary. In an article in the *American Law Register* of May and June, 1882, reviewed in

2 C. L. T. 333, 383, Mr. Lawson showed that both the English and American authorities were against the right of action. He contended for the right in the U. S. A. on the weight of reason, because the English doctrine is that there is a remedy, but that the judgment for costs is a sufficient one, while in the U. S. A., where costs are not given, there is nothing substituted for them.

Ibid.—27th October, 1883.

Common Words and Phrases. Move, Remove; Wheat; Vacant; Loading; Conceal; Goods or Articles; Cattle-guards; Trinkets; Silk in a manufactured state; Glass; Damages by the elements; Voluntary; Walking or being; are defined.

The Presumption of Continuance, by JOHN D. LAWSON. Rule 3. Sanity or insanity once proved to exist is presumed to continue. But *aliter*, as to temporary insanity, produced by drunkenness, violent disease, or other cause. Rule 4. The character and habit of a person is presumed to continue as proved to be at a time past. Rule 5. Specific acts done in other cases do not raise the inference that a similar act was done in another case, and evidence of them is inadmissible. Rule 6. The habit of an individual being proved, he is presumed to act in a particular case in accordance with that habit. Rule 7. But a future continuance is never presumed. Rule 8. An admission made by a party to a suit, or his attorney, that a certain fact exists and need not be proved, does not dispense with proof of the existence of that fact subsequent to the date of the admission. Rule 9. And a presumption is not retrospective. Rule 10. In case of conflicting presumptions the presumption of the continuance of things is weaker than the presumption of innocence. Illustrations of these rules are given.

American Law Register.—August, 1883.

Specific Enforcement of Contracts to Transfer Stock, by ADELBERT HAMILTON. The contract is first discussed. It must be mutual, for consideration, not dependent on another contract unperformed, it must not be unconscionable or fraudulent, performance must be possible, it must not be contrary to public policy. The promisor must have the stock at the time he contracted to convey it. The remedy at law must be inadequate. If the stock is always in the market specific performance will not be enforced. Where a company refuses to accept and register the transferee of shares the contract will not be enforced.

Ibid.—September, 1883.

Express Warranties in Sales of Personal Property in the United States and Canada, by ARTHUR BIDDLE. The subject is treated under the following heads:—Creation of the contract of warranty by the agent; effect of the contract of warranty on the parties; scope of the agent's authority to warrant; sales; exchanges; remedies of the

buyer; avoidance of the contract for the fraud of the seller; action for breach of warranty; measure of damage.

American Law Review.—July-August, 1883.

Titles of Statutes, by U. M. ROSE. At first Statutes had no titles. When they began to be used, they were affixed by a ministerial officer of the House, and had no signification. Now the title of a statute may be referred to in order to ascertain the intent of the Legislature in case of serious doubt, both in England and in the U. S. A. In England, the marginal notes of an Act of Parliament may be referred to as showing its meaning, as well as the headings and divisions of different portions of a Statute. In many of the American States there are constitutional provisions to the effect that no law shall embrace more than one subject which shall be expressed in its title. The effect of these provisions, and the cases decided thereunder are reviewed.

American Law Governing the Payment of Debts of Deceased Persons, by J. S. WOERNER.

Functions of a Prosecuting Officer, by ADDISON G. MCKEAN.

Effect of Abandonment upon the Ship-Owner's Right to Freight and General Average, by James M. OXLEY. The learned writer notices a recent decision, the *Annie M. Allan*, (ante, p. 108) in Nova Scotia, and after reviewing the only two English cases said to exist upon the subject, viz., the *Sublornstem*, L. R. 1 A. & E. 293, and the *Kathleen*, L. R. 4 A. & E. 269, concludes as to the right to freight as follows: "The law may, therefore, be considered as finally settled in all cases where the cargo-owner intervenes and demands a return of his property, free of all claims for freight, as in *The Cito*, (45 L. T. N. S. 663) or prays the Court to sell it in order that the claims of the salvors may be satisfied, as in *The Kathleen*. But it remains an open question as to what would be the action of the Court where the cargo-owner did not intervene nor appear before it at all. Would the ship-owner be allowed his freight? In the absence of any direct assistance from the authorities, it is our own humble opinion that he would not." Upon the right of a ship-owner to general average, the learned writer attacks the decision and cites authorities to show that no such right exists. "In the *Annie M. Allan*, the abandonment was total and final, and the vessel left absolutely to the mercy of wind and wave, with little or no expectation of ever seeing her again; consequently, as it seems to us that the possession of both ship and cargo being thus parted with, and there being no maritime lien for general average, the learned judge was in error in allowing the claim of the ship-owner, as against the cargo for a contribution towards the losses he had sustained."

The Married Women's Property Act, 1882, England, by T. W. TEMPANY. A description of the changes wrought by the Act.

Canada Law Journal.—1st October, 1883.

Mode of Enforcing Judgments of the Court of Appeal.

After a review of the cases (during the course of which, the learned writer points out that it would be absurd and almost impossible to make a physical alteration of the judgment itself upon every variation made on appeal) the conclusion arrived at is that a rule of Court should be passed to set at rest the conflicting decisions. He thinks the decision of Patterson, J.A., in *St. John v. Rykert*, ante, p. 119, the preferable one.

Criminal Law Magazine.—May, 1883.

The Accused as Witnesses, by R. V. W. Du Bois. A review of the law as enacted by various statutes permitting accused persons to give evidence. The matter of the statutes of various States is set out, and the leading cases upon the various phases of the law are cited.

Judicial Discretion, by HENRY P. KAUFMAN. A short inquiry into the exercise of discretion by judges.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

[6TH OCTOBER, 1883.]

NEILL v. THE TRAVELLERS' INSURANCE CO.

Leave to appeal to Supreme Court—Appeal therefrom—Discretion of Judge.

Held, Spragge, C.J.O., *dubitante*, that an appeal will not lie from the allowance by a Judge of this Court of further time to appeal to the Supreme Court of Canada.

Per Spragge, C.J.O. Where the appeal is from the exercise of discretion by a Judge, as in this case, the court should not reverse his exercise of discretion.

Osler, Q. C., for the motion.

G. H. Watson, contra.

PLATT v. ATTRILL.

Appeal—Two arguments—Costs.

The retirement of Blake, V.C., who sat during the argument, occurred before judgment, whereupon it was ordered that the appeal should be re-argued before the Court as at present constituted.

Held, following *In re Pender*, 10 Jur. 891, that the successful party was entitled to the full costs of both arguments.

C. P. D.]

COCHRANE v. BOUCHER.

Divisional Court—Constitution of—Two Judges one of whom tried the cause—Validity of judgment—Appeal.

The judgment of the Chief Justice of the Common Pleas, before whom and a jury the action was tried, was moved against before a Divisional Court composed of the Chief Justice and two other Judges. The judgment of the Divisional Court was delivered by the Chief Justice and one of the other Judges, the third Judge being at the time engaged in other duties.

Held, that the Court so constituted was prohibited from adjudicating upon the motion by sec. 29, s-s. 5 of the Judicature Act; that there was no judgment validly pronounced from which to appeal; and therefore that the leave to appeal should not be granted.

H. T. Beck, for the motion.

McLAREN v. THE CANADA CENTRAL RAILWAY CO.

Negligence—Contributory Negligence—Evidence.

The appeal from the judgment of the Court below, 32 C. P. 324; 2 C. L. T. 199, was dismissed, the Court being equally divided.

Bethune, Q.C., and *W. H. Walker*, for the appellants.

McCarthy, Q.C., and *Creelman*, for the respondent.

MONKHOUSE v. THE GRAND TRUNK RAILWAY CO.

Railway Company—Accident to Employee—Railway Accidents Act, 1881—Dominion Railway—Liability.

The plaintiff, a workman employed by the Grand Trunk Railway Company, was injured while in the discharge of his duties, by reason of his foot having been caught in one of the frogs of the rails, which was not packed in the manner set forth in 44 Vict. cap. 22 (O).

Held, reversing the decision of the Court below, that the Grand Trunk being a Dominion Railway, and without the jurisdiction of the Provincial

Legislature, was not affected by the Statute, and therefore the defendants were not liable for the injury complained of.

Bethune, Q.C., for the appellants.

Mulock, for the respondent.

PROUDFOOT, J.]

SAYLOR v. COOPER.

Deed, construction of—Consideration—Way.

The judgment of the Court below, 2 C. L. T. 354, was affirmed.

Moss, Q.C., for the appellant.

Bain, for the respondent.

HOWES v. THE DOMINION INS. CO.

Fire Insurance—Change in the character of risk—Mortgagor and Mortgagee—Subrogation.

The plaintiff having executed a mortgage in favor of a Loan Co. whereby he covenanted to insure the buildings on the property, failed to insure but assented to an insurance effected by the Company in their own name, and repaid them the premium. The premises insured were described as a "two story frame, shingle roofed building * * owned and occupied * * as a steam bending factory." The property having been destroyed by fire, the Insurance Company paid to the Loan Company the amount insured, and took an assignment of their mortgage, and the plaintiff thereupon instituted proceedings against the Insurance Company, seeking to redeem the property on payment of what was due on the mortgage after crediting the amount of insurance. It was shewn that the premises instead of being used as a steam bending factory, had been converted into a door and sash factory; of which change no notice had been given to the Insurance Company, although the change materially increased the risk.

Held, reserving the judgment of the Court below, 2 C. L. T. 355, that the statutory condition as to change of occupation or use of the buildings without notice to the Insurance Company had been broken, thus invalidating the policy; and that the plaintiff was not entitled to any benefit thereunder.

Held, also, that the Insurance Company were at liberty to set up this defence, though as between them and the mortgagees the policy was by the subrogation clause made unconditional.

E. Martin, Q.C., for the appellant.

W. Cassels, for the respondents.

ARCHER v. SEVERN.

Will, construction of—Devise to creditor—Satisfaction.

The testator by his will made in July, 1877, devised to his son G. certain real estate and a brewery, saying "this devise to be accepted by, and to be in full discharge of any and every claim he shall have against my estate at the time of my decease." In a subsequent clause the testator declared that in the event of selling lands specifically devised the proceeds were to be substituted for the lands by charging the proceeds against the real estate of the testator. The testator was indebted to G. in the sum of \$36,145.86, and on the 8th of October, 1879, the parties met and agreed that the testator should sell the lands in question, including the brewery, to G. for \$27,000 and the brewery plant for \$6,987.20, which was credited on G.'s claim against the testator. G. now instituted proceedings against the estate of the testator, seeking to obtain payment of the amount for which the brewery premises and plant were sold, as having been devised to him, he swearing that he was ignorant as to the contents of the will at the time the sale was made to him by the testator.

Held, reversing the judgment of the court below, that the agreement entered into between the testator and son superseded the devise to the son.

Bethune, Q.C., for the appellant.

S. H. Blake, Q.C., for the respondents.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[WILSON, C.J., 23RD OCTOBER, 1883.]

FARMER v. HAMILTON TRIBUNE PRINTING & PUBLISHING CO.

Libel and slander—Public newspaper—Justification—Public benefit—Demurrer.

To a statement of claim charging the defendants with publishing of the plaintiff in their newspaper, that he had seduced and betrayed one B. P.,

and was a man unfit for the society of respectable people, etc., whereby the plaintiff was injured, etc., the defendants pleaded that the article was published *bona fide* and without malice, and for the public benefit, and in the usual course of the defendants' duty as public journalists, and was a correct, fair, and honest report of proceedings of public interest and concern.

Held, on demurrer, that the defence was bad.

Robertson, Q.C., for the demurrer.

Lash, Q.C., contra.

[30TH OCTOBER, 1883.]

REGINA v. McELLIGOTT.

Conviction—Assault—Stopping carriage by standing in front of horses.

The defendants were convicted for unlawfully assaulting F. V. "by standing in front of the horses and carriage driven by said V., in a hostile manner, and thereby forcibly detaining him the said V. in the public highway against his will."

Held, that the conviction was bad in stating the detention as a conclusion, and not as parcel of the charge, which, as shown by the conviction, was merely standing in front of the horses and did not amount to an assault.

Aylesworth, for the conviction.

Creelman, contra.

COMMON PLEAS DIVISION.

[WILSON, C. J., 16th October, 1883.]

COCHRANE v. BOUCHER.

Divisional Court—Constitution of—Two judges, one of whom tried the cause—Judgment—Validity of.

H. T. Beck, moved for an order setting aside the judgment of the Divisional Court and staying the proceedings, on the ground that the court

which delivered the judgment had been declared by the Court of Appeal to be improperly constituted; ante p. 544.

Lash, Q.C., asked that the judgment already entered should stand until the judgment of the court had been formally delivered, and then that it should be ordered to stand as entered on the day of delivering judgment.

Held, that the judgment was void, and the order was made as asked, without costs.

CHANCERY DIVISION.

[THE CHANCELLOR, 29TH SEPTEMBER, 1883.]

ONTARIO BANK v. LAMONTE.

Assignment for creditors—Impeachment by creditor—Duties of trustee—Sale of realty—Carrying on debtor's business.

Held, that an execution creditor could not impeach an assignment for the benefit of creditors which imposed no conditions upon the creditors, merely on the ground that the debtor had before the assignment made preferential dispositions of property not embraced by the deed of assignment.

Semble, that a deed of assignment which transferred chattels subject to the payment of rent would not be bad on that account.

The duties of a trustee for creditors are analagous to those of executors in the administration of estates; and the Court having regard to the practice in such cases, and to the fact that an execution creditor cannot sell land within a year, will consider that a year is a proper time within which a sale may be made of the realty comprised in a deed in trust for creditors; at the expiration of which time the onus is on the trustee of satisfying the Court that there should be further delay.

Held, therefore, that a deed by which the sale of the realty was to be in the discretion of the trustee, was not bad on that account, but the meaning to be imputed to the words used was that the trustee should sell within a reasonable time.

The deed contained a clause that the trustee should sell the personalty immediately, except such parts as were necessary to be kept for the purpose

of enabling the trustee to wind up the business to the best advantage, and that he should not be authorized to carry on the business except so far as might be necessary in the interest of the creditors in winding up the estate.

Held, that this did not invalidate the deed.

MUNDELL v. TINKISS.

Fraudulent deed—Secret trust—Rectification.

The plaintiff executed a conveyance, absolute in form, for the twofold purpose of securing a debt to the grantee, and guarding himself against apprehended claims of other creditors. The consideration was stated to be \$1500, but at the time of the conveyance the debt had been reduced to \$200 or \$300. He now sought to have it declared that the deed was in fact a mortgage.

Held, that the conveyance having been executed for a fraudulent purpose, the parties should be left as they had placed themselves.

[10TH OCTOBER, 1883.]

MERCHANTS' BANK v. HANCOCK.

Ontario Joint Stock Companies Letters Patent Act—Warehouse receipt.

Advances had been made by the plaintiffs, the Hamilton Knitting Company, incorporated under the Ontario Joint Stock Companies Letters Patent Act, for the general purposes of the Company, taking warehouse receipts therefor. There was no by-law of the Company authorising this, pursuant to R. S. O. cap. 150, sec. 30, s-s. 2.

Held, in an interpleader issue between the bank claiming under the warehouse receipts, and an execution creditor, that the Company had power to warehouse their goods and raise money on the warehouse receipts as necessary to the carrying on of their business; and that the absence of a by-law, if one were necessary, could not be taken advantage of by a creditor, no fraud being alleged.

MALCOLM v. HUNTER.

License to use water—Easement.

The defendant's predecessor in title, more than twenty years before action made a cut from a spring upon his land to the mill of his nephew, the plaintiff, which answered the joint purpose of feeding the plaintiff's

mill, and draining the uncle's land. At times the cut became choked, and the water flooded the uncle's land, whereupon he turned it into its natural course until the nephew cleaned out the cut. The defendant was told before purchasing that the plaintiff had no right to the water, and the uncle told the plaintiff in 1874 that he would have to charge him something for the use of the water.

Held, that the plaintiff by his user of the water had not acquired an easement in it.

CULHAM v. STEWART.

Trustee and cestui que trust—Misapplication of trust moneys—Lien.

A trust fund, of which the plaintiff was beneficiary, had been received by C. in 1881, who, instead of investing it according to the terms of the trust, had used it in paying his trading debts. In 1883 C. made an assignment to his co-defendant in trust for creditors. There was no specific property which could be identified as having been purchased with the trust money.

Held, that the plaintiff was not entitled to a lien on the general assets of C., but that he could only prove for the debt on his estate.

LONG v. HANCOCK.

Fraudulent preference—Pressure.

The Hamilton Knitting Company, incorporated under the Ontario Joint Stock Companies Letters Patent Act, being insolvent, the plaintiff pressed them by word of mouth and letters to pay an overdue account of \$4750, or to give security. They could not pay, and they were disabled by the terms of their charter from giving security. The form was then gone through by the plaintiff of lending \$5000 to the Company, to secure which they gave him a chattel mortgage upon all their available chattel property, out of which loan they immediately paid the plaintiff his debt.

Held, in an interpleader issue between the plaintiff and an execution creditor, that there was no *bona fide* pressure to induce the giving of the security, which was merely a device to prefer the plaintiff, and therefore void.

[FERGUSON, J., 19TH OCTOBER, 1883.]

DUNN v. THE BOARD OF EDUCATION OF WINDSOR.

Public school—Transfer of pupil—Want of accommodation—Mandamus.

A child was registered at one of the two public schools in the Town of Windsor, and attended thereat during the last school term; on 3rd September last, the plaintiff, her father, made application for her admission into the other school, which being refused, he applied for a mandamus. By the Public School regulations, cap. 12, sec. 6, it is declared that a registered pupil shall continue at the school at which he has been registered till regularly withdrawn; by sec. 7, the Inspector may transfer pupils. The plaintiff had not complied with these regulations.

Held, that he was not entitled to a mandamus.

It appeared that the school to which he sought admission for his child did not afford accommodation for her.

Held, a sufficient ground for refusing the mandamus.

PROCTOR v. WELLER.

Judgment for recovery of land—Writ of possession—Subsequent ouster by defendant—New writ of possession.

Where the plaintiff had been put in possession of land under a writ of possession, which was thereupon returned by the sheriff as executed, and the defendant less than a year afterwards regained possession, and kept the plaintiff out, no change having occurred in the title in the meantime,

Held, that the plaintiff was entitled to a new writ of possession.

The plaintiff recovered a judgment against the defendant, whereby he became entitled to recover the land in question. A writ of possession was issued upon the judgment, and the sheriff thereunder delivered possession to the plaintiff, and returned the writ as executed. The land was about nine miles from the plaintiff's residence, and he did not occupy it. He, however, made repairs to fences, exercised other acts of ownership over it, and endeavoured to get a tenant for it. He put one tenant in possession, but the defendant by his violent conduct in the neighbourhood, and by committing depredations on the land, frightened him away. Finally, less than a year afterwards, the defendant broke into the house on the premises and retained possession, refusing to give it up to the plaintiff. No change had occurred in the title to the land in the meantime.

H. J. Scott, Q.C., now moved for a new writ of possession to put the plaintiff in possession. He referred to MacLennan on Jud. Act, p. 312.

Hoyles, for the defendant, argued that the writ already issued having been returned executed, was exhausted; that the Court had already done

all that could be done towards enforcing the judgment, and that the plaintiff must bring a new action. He cited *Wilson v. Charter*, 10 W. R. 546.

PROUDFOOT, J., 23rd October, 1883.—I think the Judicature Act and Rules have worked a change in the practice, which is now different from what it was before. It is true that by Rule 379, the judgment in an action to recover land is to be enforced in the manner heretofore used in actions of ejectment. But Rule 381 goes on to provide for the effect of the writ of possession, which, in addition to its former effect, is now to have the effect of a writ of assistance as well. Again, the form of the writ (No. 178 of the Appendix to the Rules) shows that the sheriff is not only to defend, but to defend and keep possession for the party named in the writ. The writ is not exhausted by its return. The sheriff must continue to keep the plaintiff in possession. I do not say how long he may continue. It is now asked that he put the plaintiff in possession after the lapse of less than a year from judgment; and I think he should do so. I cannot look upon this land as altogether vacant. The plaintiff lived some eight or nine miles away; but he did all that he could do to keep possession. He made repairs to fences, and attempted to get a tenant for it; he actually did get a tenant, who, however, was frightened away by this defendant. If the Court were now unable to enforce its judgment, it would be a failure of justice. If the sheriff has returned the writ by mistake, his mistake should be corrected. If he rightfully returned the writ, I think a new writ should issue.

I order that a new writ of possession do issue to put the plaintiff in possession. The defendant must pay the costs.

Maritime Court.

[TOMS, SUR. J., 8TH OCTOBER, 1883.]

THE STEAM BARGE "ISAAC MAY."

Seamen's wages—Jurisdiction.

This was a proceeding *in rem* by one Parsons against the steam barge *The Isaac May* for the balance of his wages for the season. The agreement between him and the owner was contained in several letters, the result of which was that Parsons became master of the barge for the season at the sum of \$900. He was wrongfully dismissed during the season and was paid the proportion of his wages up to the time of dismissal.

Held, that there was no such special contract or agreement as to oust the jurisdiction of the Court, and that the petitioner was therefore entitled to recover.

Garrow & Proudfoot, proctors for petitioner.

McCarthy, Osler, Hoskin & Creelman, proctors for the owner.

(Reported by W. Proudfoot, Esq., Barrister-at-Law.)

MANITOBA.

In the Queen's Bench.

REID v. WHITEFORD.

Estate tail—Barring entail—Enrolment of deed.

A conveyance barring an entail does not require enrolment, registration being sufficient.

By deed dated the 16th December, 1880, made between James Kerr, of the first part, Laura Jane Kerr, his wife, of the second part, and Alex. M. Bell, David C. Bell, and John Alex. Kerr, of the third part, James Kerr settled certain lands therein described "for the separate use and behoof of the said party of the second part for and during her natural life," and after the decease of the said party of the second part "for the said James Kerr, party of the first part," and after the decease of the said James Kerr "for the heirs of the body of the second part by the said party of the first part, lawfully begotten, and on default of such issue then surviving, then upon trust for the said James Kerr his heirs and assigns for ever.

Subsequently by deed dated the 22nd December, 1882, made in pursuance of the Act respecting short forms of conveyances between Alex. M. Bell, David C. Bell, and John Alex. Kerr of the first part, Laura Jane Kerr of the second part, James Kerr of the third part, and Hayter Reed of the fourth part, after reciting the estates and interests of the parties under the deed of 16th December, 1880, and that the parties of the first, second, and third parts had agreed with the party of the fourth part, for the sale to him of the unencumbered fee simple in possession of the hereditaments thereafter expressed to be granted, the several parties according to their respective estates and interests did grant and confirm unto the party of the fourth part, certain lands, being the same as those described and conveyed by the deed of 16th December, 1880, to have and to hold the said premises thereinbefore expressed to be thereby granted unto the said party of the fourth part his heirs and assigns for ever, freed and discharged from the said estate tail and all other estates tail of the said party of the second part in the same premises, and all remainders and reversions, estates, rights, interests and powers, to take effect before or after the determination or in defeasance of such estate tail, or estates tail, to the use of the said party of the fourth part his heirs and assigns forever.

This deed contained a covenant on the part of the parties of the first part that they had done no act to encumber, and covenants by the parties of the second and third that they had done no act to encumber; that they

had the right to convey; for further assurance; and that they had a good title to their respective estates; on this deed was endorsed a certificate that Laura Jane Kerr had acknowledged the deed and had been examined separately and apart from her husband, touching her knowledge of the contents of said deed and her consent thereto, and that she had declared the same to be freely and voluntarily executed by her. This certificate purported to be signed by "W. Leggo, Master in Equity, Manitoba."

On the first of May, 1883, the plaintiff contracted to sell part of the land conveyed by the above mentioned deeds to the defendant. The defendant having taken certain objections to the title, the present suit was instituted for the purpose of enforcing specific performance of the agreement for purchase.

P. O. Macdonald, for the plaintiff.

Hough, for the defendant.

TAYLOR, J., April, 1883.—The objections taken by the defendant are: That, although a deed pretending to bar the entail has been executed, it has not effectually done so, and that there is no method in this country by which an estate tail can be barred. He claims that the conveyance barring the entail must be enrolled in Chancery, and that a certificate of the Master in Equity as to the acknowledgment of the execution of the deed by Laura Jane Kerr, verified by affidavit, must be filed in the Court of Common Pleas at Westminster; but neither of these requirements has been, and in fact neither of them can be, complied with. In answer to these objections the plaintiff contends that the deed in question has been registered in the Registry Office for the City of Winnipeg, where the lands lie, and that such registration is a sufficient compliance with the terms of the statute under which the deed is executed.

In the absence of any local legislation on the subject, the method of barring an estate tail in this Province seems to be governed by the provisions of the Act for the abolition of Fines and Recoveries, 3 & 4 Wm. IV. cap. 74.

The 41st section of that Act provides that "no assurance by which any disposition of lands shall be effected, etc., by a tenant in tail shall have any operation under this Act, unless it be enrolled in Her Majesty's High Court of Chancery within six calendar months after the execution thereof." The 84th section requires, in the case of a married woman, an acknowledgment before a Judge, Master in Chancery, or two perpetual Commissioners, and the 85th section requires a certificate of this acknowledgment, verified by affidavit, to be filed with some officer of the Court of Common Pleas at Westminster, appointed by the Lord Chief Justice. I am not aware that the question raised has ever been so before in this Province, nor can I find any decisions in Ontario before the passage of the Act of Upper Canada respecting the barring of estates tail.

There are, however, several Ontario decisions respecting deeds under a Statute which contains some similar provisions.

The Court there has held that the Statute 9 Geo. II. cap. 36, the Statute of Mortmain, was introduced into Upper Canada by the Constitutional Act of

1792, or recognised by the legislature as in force. The first section of that Act provides that no manors, lands, etc., shall be given, granted, etc., unless such gift, conveyance, etc., be made, etc., "and be enrolled in Her Majesty's High Court of Chancery within six calendar months next after the execution thereof." In the case of *Hallock v. Wilson*, 7 C. P. 28, in which the plaintiff claimed title under a deed for a charitable use, and not enrolled in Chancery, Hagarty, J., who delivered the judgment of the Court, said, at p. 30, "if the case were to turn on the mere question of enrolment in Chancery, we think any Court in this country would hesitate long before deciding against the plaintiffs, taking into consideration the object of enrolment under the Act of 9 George II., to ensure publicity in a country where only two counties enjoyed a land registry office."

Although in the earlier part of the judgment, the Upper Canada Statutes, 1 Wm. IV. cap. 1, sec. 47, and 13 & 14 Vict. cap. 63, sec. 6, which dispense with the enrolment of deeds of bargain and sale, and substitutes therefor registration, are referred to as affording an additional reason for holding the plaintiff's deed valid, yet in the concluding part the Court seem to rest their finding broadly on the fact that enrolment of deeds had never prevailed to any extent in the province, the absence of the necessary machinery to carry it out, and the reason and object of enrolment itself. That case was followed by *Mercer v. Hewston*, 9 C. P. 349, when the question arose as stated by Draper, C.J., whether the deeds in question, "which, according to the express language of the 9 Geo. II. would be wholly inoperative and void unless enrolled in the Court of Chancery, can pass the estate, either because enrolment was not requisite in Upper Canada, or because registration is equivalent thereto." There the Court, after a full consideration, held that the deed in question having been executed before 1837, *ex necessitate* enrolment must be dispensed with, there having been no Court of Chancery in which it could be enrolled. Here we have a Court of Queen's Bench which possesses and exercises "all such powers and authority as by the laws of England are incident to a Superior Court of civil and criminal jurisdiction, and which shall have, use, enjoy, and execute all the rights, incidents and privileges as fully to all intents and purposes as the same were on the 15th day of July, 1870, possessed, used, exercised and enjoyed by any of Her Majesty's Superior Courts of Common Law at Westminster, or by the Court of Chancery at Lincoln's Inn." Possibly under this, the deed in question and similar deeds might be enrolled in the Court of Queen's Bench, although it may be observed that in the 6th section of cap. 31 of the Con. Stat., which defines the jurisdiction and powers of the Court of Chancery in England, which may be exercised by this Court, there is no general head under which the enrolment of deeds could well be said to fall. However this may be, it is evident that the other requirements of the 85th section of the English Act, and which is as imperative as the enrolment in Chancery, namely, the giving of a certificate of the acknowledgment of the execution of the deed under some officer appointed by the Lord Chief Justice of the Court of Common Pleas, cannot be complied with.

Such being the case, considering that the provisions of the Imperial Act, or similar provisions, cannot well be complied with, and considering that

the object of enrolment was to ensure publicity, and that that can be obtained as fully, and indeed more effectually by registration in the Registry Office of the district where the lands are situate, I think I should hold that in this Province enrolment is not necessary, but that registration in the Registry should be considered as sufficient.

Entertaining that opinion, I must hold that so far as the objections taken before me by the defendant extend, the deed of the 22nd December, 1882, was effectual as a bar of the estate tail in the lands in question.

[NOTE.—Compare with this a point which arose under the marriage laws in Upper Canada. The Imperial Act, 26 Geo. II. cap. 33, forbade the issue of a license for the marriage of persons under age without the consent of their parents. The 11th section declared that marriage in contravention of this Act should be null and void. The 12th section allowed an application to be made to the Lord Chancellor for his consent where the parents were *non compotes mentis*, beyond the seas, or withheld their consent unreasonably. It was held in *R. v. Roblin*, 21 U. C. R. 352, and *Hodgins v. McNeil*, 9 Gr. 301, that although the Imperial Act was generally in force in Upper Canada, the 11th and 12th sections were not. The reason given in the former case was the impossibility of compliance with the requirements of the 12th section.—ED. C. L. T.]

BOULTBEE v. SHORE.

Specific performance—Damages—Date of assessing damages.

In an action by a purchaser for specific performance of a contract to sell lands intended to be held by him for sale, where damages have been decreed instead of specific performance on account of the sale of the lands to a third party, the date of the breach of the contract is the period at which the value of the land in question is to be estimated for the purpose of assessing the damages.

Appeal from the Master in Equity. The facts of the case sufficiently appear in the judgment.

Mulock, for the appeal.

Howell and *Hough*, contra.

TAYLOR, J., April, 1883.—Since the passing of the Imperial Act, 21 & 22 Vict. cap. 27 (generally known as Lord Cairns' Act) the Court of Chancery may, if it thinks fit, award damages either in addition to, or in substitution for, specific performance. The present case is one falling within the class of cases intended to be provided for by that Act.

A decree has been made which directs the master to make enquiry into and take an account of the damages to which the plaintiff is entitled from the defendant. The decree further declares that the defendant, being a trustee of the legal estate in the lands in question, and having in violation of his duty wilfully and fraudulently sold and conveyed away the lands, is on this ground also liable to account to the plaintiff. Pursuant to this decree, the master has made a report, against which the defendant

appeals on the ground that the master has taken the account of damages on a wrong principle, and so charged too much against the defendant.

The learned counsel for the plaintiff contended that the court should not interfere, because it will do so only where the damages awarded are grossly extravagant, which is not shewn to be the case here. The objections taken, however, that too great damages have been awarded because the master has proceeded upon a wrong principle in fixing the amount, seems to me quite open to the defendant.

The object of the Imperial Act, 21 & 22 Vict. cap. 27, was to enable a Court of Equity to do complete justice in cases where it previously had jurisdiction, but where circumstances had occurred which disabled the court from decreeing specific performance, and so rendered it necessary for the plaintiff to seek relief in a Court of Law for damages. Under the Act the court can do complete justice between the parties by the award of adequate damages for the non-performance of the contract.

The learned counsel for the defendant conceded that the present is not a case where the failure to convey has arisen from defective title, or anything of that nature, whereby the defendant is liable for nominal damages merely. He practically admitted it to be a case in which the defendant must pay substantial damages. The only question is how should the *quantum* of these damages be ascertained.

That the defendant is by the decree declared liable to account as a trustee does not, so far as I can see, make any difference in the extent of his liability. Where a trustee is guilty of a breach of trust, the rule of the court is that he shall not be allowed to benefit by his own improper act; that any profit he has thereby made shall be handed over to his *cestui que trust*, who is to be placed in the same position which he would have been in, had the breach of trust not occurred. In exactly the same way, where a vendor has failed to carry out his contract under circumstances, which, as here, render him liable for substantial damages, "the rule of law," it was said by Lord Chelmsford in *Bain v. Fothergill*, L. R. 7 H. L. 158, "is well settled, that the measure is the difference between the contract price and the market value. It is true that often it is difficult to determine the market value, but it can in the case of real as of personal property, be determined by a comparison of sales of property nearly similar in the situation and quality of the lands."

The question then remains, what period of time is to be fixed upon as that at which the value is to be taken for the purpose of estimating the damages. The master has taken the month of February, I presume because the defendant says he intended holding the property until then.

One American case places the time at the empanelling of the jury; *McConnell v. Dunlop*, Hardin, 41. In Sedgwick on Damages, at page 374, an English case of *Robertson v. Dumaresq*, 2 Moo. P. C. N. S., is referred to. I have been unable to see the report of that case; but in Sedgwick it is stated that the plaintiff was held entitled to compensation measured by the value of the specified land at the time of bringing suit. In Fisher's Digest, where the same case is referred to, it is said to have been "at the

time of the trial." Singularly enough this case does not seem to have been referred to in any of the more recent cases.

The weight of the authority seems to me to be in favour of fixing upon the date of the breach of the contract as the date at which the value is to be estimated. The question is what was the value of the land upon that day. What sum would on that day have enabled the plaintiff to purchase other land, similarly situated and of equal value.

The arguments and the reasoning which apply in the case of lands contracted for, with the purpose of being held by the purchaser or built upon and occupied by him, have no place in this case, which is one of lands bought with the intention of turning them over at the first opportunity to the highest bidder.

In my opinion, the 26th of November, when the defendant became aware that the land had been conveyed away should be the date fixed as that on which the breach of contract occurred.

Mr. Howell argued that to fix upon that date or the 24th of November would have the result of making the defendant hand over merely the increased price at which he sold, and would not in any way punish him for his misconduct.

Damages by way of punishment are sometimes given in cases of tort, not so far as I am aware in cases of breach of contract. Even where there has been a breach of trust, restitution, not punishment, is what the court aims at.

The appeal must be allowed with costs.

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THE PROPOSED BANKRUPTCY BILL.

EVER since the repeal in 1880 of the Insolvent Act of 1875, there has been more or less dissatisfaction on the part of the commercial community with the existing laws for the collection of debts from insolvent debtors. This feeling has continued to increase, and now that it is generally felt that the country is on the verge of a stringent period, the uneasiness increases to alarm.

The necessity for some law for the rateable distribution of the assets of debtors unable to meet their engagements has been repeatedly insisted upon by the different Boards of Trade. The Montreal Board has probably been foremost in its demands for legislative relief. During the present year the subject has received much attention not only from eastern merchants but from the Toronto and Hamilton Boards as well, and recently arrangements have been made to concentrate the energies of all three Boards. A joint committee has been appointed, and the measures proposed by the Montreal Board on the one hand, and by the Toronto and Hamilton Boards on the other, are being assimilated. Immediately upon the completion of this work, it is proposed that delegations from all the Boards shall wait upon the Government and urge upon them the necessity of submitting

some such bill as that now being framed, and having it passed during the coming session of the Parliament of Canada.

The complaints of the advocates of the new Bankruptcy Bill briefly summarized are, in the first place, that it is advisable to have one law for the distribution of assets applicable to the whole Dominion. The fact that many wholesale houses have transactions in a number of different Provinces subjects them, under the existing state of things, to a very great deal of difficulty and uncertainty from the variances that exist in the rules of law and procedure in force in the different Provinces. In the next place, it is objected that the present state of things practically permits an insolvent debtor, in all the Provinces except Quebec, to make what disposition he chooses of his assets. In New Brunswick and Nova Scotia there appears to be no law whatever prohibiting preferences, and so far as Ontario and Manitoba are concerned the laws in force having that object are, as all know, a dead letter, on account of the ease with which the provisions of the statutes may be evaded. In the Province of Quebec a different state of things exists, though, in the opinion of merchants generally, it is not much more satisfactory in its practical working. It is further asserted that the present state of things leads to sharp and unscrupulous conduct on the part of creditors seeking an advantage over each other, and to consequent bad faith and ill-feeling among merchants. It is also pointed out that unnecessary expense is incurred, by separate proceedings being taken by each creditor against a common debtor, instead of there being one process by which his assets might be distributed; and that litigation is encouraged to the ultimate loss of all parties concerned.

The measure now being framed by the joint committee of the Boards of Trade provides for rateable distribution of the assets of insolvent debtors, without any provision for their discharge from their liabilities. In asking for such a measure the Boards of Trade do not intend to be understood as disapproving of the granting of discharges, but it is thought that much of the objection to the former

law arose from abuses of the composition and discharge provided for therein, and it is desired to avoid the opposition that might reasonably be anticipated to any attempt to re-introduce those clauses. Should the Government prefer to bring in a measure providing not only for the distribution of assets but for the discharge of debtors, it is probable that the mercantile community generally will be quite content to accept such a law as being preferable to no insolvency law at all.

The proposal is to make the law applicable, in the same way as the Act of 1875, to traders only. On this point again the Boards of Trade are, it is believed, not expressing any view adverse to the same law being made applicable to all other persons, as well as to traders, but it is with traders that they are more immediately concerned. If the House prefers to make the measure applicable to all debtors, commercial men can scarcely object.

Among the abuses under the former bankruptcy laws were mal-administration, overcharges, and disreputable conduct, on the part of assignees. Many plans have been suggested from time to time to secure efficient and honest administration. While there can be no doubt that the clamour about assignees was made to cover a multitude of creditors' sins, no one contends that the complaints on this score were foundationless. The mode now suggested is that estates shall, in the first instance, pass into the hands of a guardian who shall be ineligible for appointment as trustee. This guardian, it is proposed, shall in every county, except those containing cities with a population of more than 20,000, be the sheriff of the county. In the latter counties, it is proposed to give to the Boards of Trade the power of appointing one person for each county as guardian, and requiring him, before acting, to give security to the amount of \$4,000 to the approval of the Department of the Secretary of State. Pending his appointment and the completion of his security, the sheriff is to act as guardian in the same manner as in other counties. The creditors at their first meeting are empowered to appoint their own trustee, and since the power formerly given them of requiring the trustee so appointed

to give security for the due performance of his duties was found to be unworkable and useless, it is now suggested that no one shall be eligible for appointment as trustee of any estate who has not first given security to the satisfaction of the Department of the Secretary of State to the amount of \$10,000, for the due discharge of his duties as trustee of all estates which may come to his hands. This would throw the liquidation of estates into comparatively few hands, and would, it is thought, secure the services of competent men. The creditors would have the right to make free choice from among those who had qualified, but would be powerless to turn the estate into any outside channel.

The grounds which shall constitute acts of insolvency, subjecting a debtor's estate to proceedings for its liquidation, are practically those set out in the Act of 1875. Indeed, throughout the whole measure it is proposed, so far as the clauses of that Act were found to work satisfactorily, to follow them as closely as may be. Among other reasons for this is the fact that those clauses have been made the subject of judicial interpretation heretofore in the different provinces, and are more generally understood than any new clauses would be. It is proposed that the guardian shall be remunerated according to a schedule rate to be fixed, and that the remuneration of the trustee shall be left entirely to the creditors. The power contained in the old law to appoint inspectors to superintend the liquidation of the estate is continued, with the proviso that there shall be either one or three inspectors appointed, if any appointment at all be made, and that the decision of the majority, shall be final.

On the subject of landlords' rights a new departure is contemplated. The Act of 1875 on this subject was framed with a view to the state of the law in Quebec, and was found very difficult of application to the laws of the other Provinces. It is now suggested that the trustees shall have the right to retain the premises held by the debtor under a lease for a period of two months after the insolvency, paying only occupation rent therefor. Power is then given (unless the lease by its terms is rendered void by the insol-

vency) to the trustee, under the authority of the creditors or inspectors, to elect to retain the term, the estate continuing liable for rent at the rate reserved until a purchaser has been found, who shall secure the rent to the satisfaction of the landlord or of the Judge in case of dispute. Even where the lease is declared to be void by reason of insolvency the same power is given, if the tenant has during the current term made improvements on the premises for which the landlord shall not theretofore have paid, unless the landlord shall pay to the estate what shall be adjudged the proper proportion of the value of such improvements. This is intended to cover the case where, as sometimes happens, the tenant at the beginning of a long lease makes valuable improvements, the benefit of which would, without compensation, otherwise go to the landlord upon insolvency taking place, without any compensation to the creditors whose goods may have supplied the means of making the improvements. There having been some doubt under the former law as to a landlord's right to distrain upon goods for overdue rent while the same were in the hands of the assignee, it is proposed expressly to prohibit such distress; and in the case of the distress being made before the insolvency, possession is required to be given immediately, subject to the landlord's preferential claim for the amount of arrears fixed by the Act, and the costs of distress. The landlord's preferential claim, it is suggested, shall be restricted to three months' arrears of rent, and it is proposed that all stipulations in leases providing for the maturing of future rent in the event of insolvency shall be void as against the trustee.

As to the sale of real estate, the provisions are practically the same as those of the Act of 1875, giving full power to the trustee, acting under the authority of the creditors or inspectors in all the Provinces except Quebec, and making such special provisions in that Province as are necessary, on account of the peculiar rules of the Civil Code on that subject.

The clauses of the Act of 1875 applicable to preferential judgments, assignments and payments, are embodied in the

new bill in an amended and enlarged form. Among other things an attempt is made to reach the case of money spent in life insurance while the debtor is in insolvent circumstances. As to the mode of voting at meetings, an important change is proposed. Under the Act of 1875, it will be remembered that a resolution required to be carried by a majority, both in number and value, of creditors having proved claims for \$100 and upwards. In the event of the majority in number being one way, and the majority in value the other, the question had to be referred to the County Judge. This reference involved delay and expense, and there appeared to be no principle by which the Judges could be guided in such cases. To obviate these inconveniences and to secure a decision in every case without reference to the Court, a compromise between the number and amount principles is suggested. The proposal is that a creditor having proved a claim of from \$100 to \$200 shall be entitled to one vote; from \$200 to \$500, two votes; from \$500 to \$1,000, three votes; for each additional thousand or fraction of a thousand, one additional vote; and in the event of a tie the chairman to have a casting vote.

The temper of the House on this subject appears to have been unpropitious hitherto, and the Government has shown such an indisposition to take the subject up, that it is difficult to forecast the course likely to be pursued now. Whatever the result may be the Boards of Trade will be able to feel, for the first time, that they have, by their united efforts, done what it was possible for them to do to secure the enactment of such a law as, they appear to feel strongly convinced, ought to have been placed upon the Statute Book when the late Insolvent Act was repealed.

D. E. THOMSON.

MORTGAGEE'S PRIVILEGE AS TO DISCOVERY OF DOCUMENTS.

The privilege of a mortgagee to deny discovery of his title deeds before payment of the mortgage debt has been so often, and in such a variety of cases, asserted, that the enunciation of the rule almost amounts to stating a truism. It is generally stated that without redeeming the mortgage, the mortgagor cannot see the deeds. But the real effect of this is that the mortgagee ceases to be mortgagee on redemption, and the deeds become the mortgagor's. Except, therefore, in the cases to be mentioned, the mortgagee's privilege seems to be absolute. We write now without reference to the English Conveyancing Act, which has worked a radical change in the rule, which rule however remains unaffected in Ontario by legislation.

A mere offer to redeem is not sufficient to entitle the mortgagor to the discovery. In *Browne v. Lockhart* (a), an offer was made to pay the interest on a mortgage on being allowed to inspect the mortgage deed, which the defendants' solicitors said neither they nor the defendants had ever seen. The letter containing this offer concluded, "we shall, therefore, be obliged by your making at our expense, a copy for us, and allowing us to compare it with the original." The reason for the discovery so sought was alleged to be, that the defendant was desirous of being satisfied as to the amount due, and as to the terms of the mortgage, and that, being a devisee of the equity of redemption, he was particularly desirous of ascertaining what were the hereditaments comprised in the mortgage, as he had reason to

(a) 10 Sim. 421.

believe that some property other than that to which he was entitled as devisee was comprised in the deed. Discovery was refused.

In *Damer v. Lord Portarlington* (b), the mortgage and other deeds and the abstracts had been deposited in Court, and the defendant, after notifying the plaintiff that he would pay him off, asked for an order to stay proceedings, and that he and his solicitors, and the solicitors of an Insurance Company who proposed to lend the money to pay off the plaintiff, should be at liberty to examine the deeds &c., for the purpose of effecting the desired loan. The motion was refused, though the court commended the laudable purpose which the defendant was endeavouring to effect.

The payment of the mortgage debt to the mortgagee and his parting with the deeds must be a simultaneous transaction (c).

In *Addison v. Walker* (d) a defendant by his answer stated that he was mortgagee of part of an estate, without saying what part, and that he had an equitable lien by deposit of title deeds which he scheduled, but insisted that he was not bound to produce them. Lord Abinger refused to compel him to state the contents of the deeds, even for the purpose of showing what part he was mortgagee of.

And in *Greenwood v. Rothwell* (e), where a mortgagee also claimed to be a purchaser of the equity of redemption, an order for the production of title deeds was refused.

And in the case of an annuity secured by mortgage production was refused (f).

All the foregoing cases refer particularly to the mortgage deed itself, and there is an entire *consensus* of opinion upon this, that the mortgagor must redeem before he can see the

(b) 15 Sim. 380.

(c) *Browne v. Lockhart*, 10 Sim. at p. 425; *Cannock v. Fauncey*, 1 Drew. 507.

(d) 4 Y. & C. 442.

(e) 7 Beav. 291.

(f) *Sparke v. Montriou*, 1 Y. & C. Ex. 103.

deeds. Upon redemption they become his own deeds and are no longer the mortgagee's deeds, and so, as we have hinted, the rule must be absolute that (except in the cases hereafter mentioned) the mortgagor, as mortgagor never can obtain discovery.

Even in a case of disputed priority, there is no right to production, and so, in *Howard v. Robinson* (g) it was said, "I am aware of no rule giving a prior mortgagee a right to see the deed of a puisne mortgagee."

This privilege of the mortgagee, is some times treated as if it stood upon a footing of its own. Vice-Chancellor Kindersley, however, brings it within the general principles of discovery. In *Howard v. Robinson* (h), his Lordship said, "There is no doubt as to the general proposition. A plaintiff has a right to have inspection of every deed, paper, or writing in the possession of the defendant which helps to make out the plaintiff's case; but no right to inspect those which only tend to make out the defendant's case. The case of a mortgagee is supposed to stand on its own special circumstances, though in fact it is only one of the cases within the general rule; however, at any rate, ordinarily, if a mortgagor files a bill against the mortgagee, he cannot see the mortgage deed without redeeming."

If this be the true foundation of the rule, it is very surprising to find all the authorities persistently refusing inspection of the mortgage deed, and no less surprising to find his Lordship in the same breath giving the reason for the rule and yet refusing to apply it to a case within the reason; and yet on the other hand, considering the persistence with which production of the mortgage deed has been refused, it is surprising to find, in *Patch v. Ward* (i), an exception which is at once contradictory to the current of authority, and within the intelligent principle of the general doctrine within which Vice-Chancellor Kindersley brings

(g) 4 Drew. at p. 527.

(h) 4 Drew. at p. 525.

(i) L. R. 1 Eq. 440.

the case of the mortgagee (*j*). That was a case of redemption, and discovery was sought by the plaintiff. The court after referring to the general rule said, "This rule does not extend to the mortgage deed itself, as to which different considerations prevail. It is the mortgage deed which conveys the property by way of pledge, and which contains the proviso for redemption, by virtue of which the mortgagor is entitled to redeem the property. The mortgage deed, therefore, is as much the evidence of the mortgagor's title to redeem as it is of the mortgagee's estate." If Vice-Chancellor Kindersley's dictum in *Howard v. Robinson* is correct, that the case of a mortgage comes within the general rule as to production, then *Patch v. Ward* must be right, and all the other cases wrong; for it is abundantly plain that the mortgage deed helps to make out the mortgagor's case in an action for redemption.

Whatever may be the principle upon which the rule rests, it seems to be so well settled that the intelligent attempt to depart from it in favour of the production of the mortgage deed was not successful. *Patch v. Ward* was decided in 1865, and in 1870 an order was made for production in *Chichester v. Lord Donegall* (*k*), but was reversed on appeal. Lord Justice Giffard, said, "I take the rule to be that, as between mortgagor and mortgagee, the right time for redemption being passed, and the mortgage not being impugned, if the plaintiff wants to see the mortgage deed, his title to redeem being admitted, he must pay the principal, interest and costs, or go on to get his redemption decree." *Patch v. Ward* was cited on the argument of this case, but was not referred to in the judgment. Counsel for the defendant said it was a peculiar case, but its peculiarity does not appear from the report, except that it stands out in contradiction to the prior current of authority. And in *Bell v. Chamberlen* (*l*), *Patch v. Ward*, was cited but not followed.

(*j*) *Howard v. Robinson*, supra.

(*k*) L. R. 5 Chy. App. 502.

(*l*) 3 Chy. Cham. 429.

The mortgagee's privilege extends to drafts and copies of title deeds, as well as to the deeds themselves (*m*). But it does not extend to accounts relating to the mortgage which may be in his possession (*n*); and the mortgagee may also be compelled to disclose the amount which he claims to be due, though he is not, until the accounts are taken, obliged to enter into details (*o*).

We have seen that production of the mortgage deed has been refused for the purpose of disclosing to the mortgagor what estates it embraces. The rigidity of this holding was departed from to some extent in *West of England, &c. v. Nickolls, supra*, an action of redemption by a second mortgagee against a first mortgagee. In that case the defendant was directed to make discovery of what securities he held, in order to enable the plaintiffs to ascertain whether it was worth while to redeem. The suppositious case was put of a mortgagee claiming an amount which might be arrived at by consolidating securities. A puisne mortgagee on being apprised of this amount might be of opinion that estate A., which his own mortgage covered, was not worth the incumbrances on it, and would therefore be unwilling to redeem. If, however, he were put in possession of such general particulars that he could identify estate B., which was also included in the prior mortgagee's security, he might be able to satisfy himself that there was ample security for the whole, and would thus be anxious to redeem in order to save his own debt. And for the reason expressed, namely, to enable the plaintiff to ascertain whether it would be worth while redeeming, partial discovery was ordered.

Where the mortgage deed is itself attacked, however, the privilege does not attach, if a sufficient *prima facie* case of suspicion is made out. Where, however, the deed is impeached for fraud, the plaintiff is not, upon the mere

(*m*) *Bycroft v. Sibel*, 20 L. T. 197.

(*n*) *Freeman v. Butler*, 33 Beav. 289; *Gibson v. Hewett*, 9 Beav. 293.

(*o*) *West of England and South Wales Bank v. Nickolls*, L. R. 6 Ch. D. 613.

allegation of fraud, entitled to its production. There must be the allegation, and also some circumstances to show the Court that the plaintiff is fairly entitled to have the matter enquired into (*p*). If the rule were otherwise, and the mere allegation that the mortgage was bad, and that its validity was to be contested, entitled the mortgagor to its production, the mortgagee might in every case be deprived of his right to resist production. In *Gill v. Eyton*, (*q*), a redemption suit, while the suit was pending, but before service of the subpoena, the mortgagee assigned his mortgage. It was alleged that the assignment was fraudulent and vexatious, and was made in order to impede the plaintiff in the enforcement of his rights, and in recovering his mortgaged property. It will be observed that the mortgage deed itself was not impeached, but the assignment was. Lord Langdale, M.R., said that this was not a sufficient reason why it should be ordered to be produced.

Where, however, the defendant by his answer or defence makes any discovery, whereby a suspicion is raised as to the mortgage deed, he will be compelled to go on and make complete discovery. In *Phillips v. Evans* (*r*), a bill to redeem, the only question was what amount the plaintiff had to pay. It depended upon the contents of an indorsement on the mortgage deed, and the time when it was executed. The defendant set out the endorsement in his answer. Sir J. L. Knight Bruce said, "Considering the manner in which the document is set out, the nature of the suit, and the circumstances relating to the insolvency of the mortgagor, I think that this is a case in which the plaintiff should see the endorsement." And in *Latimer v. Neute* (*s*), a defendant refused to give discovery; but by his answer did make some discovery. Exception was taken to it as not being sufficient, and a further answer was put in which differed from the discovery as first given, and so

(*p*) *Bassford v. Blakesley*, 6 Beav. 131.

(*q*) 7 Beav. 155.

(*r*) 2 Y. & C. C.C. 647.

(*s*) 4 Cl. & Fin. 570.

raised a suspicion as to the accuracy of the information. Full discovery was then ordered.

But a simple reference to the deed in the pleadings will not be sufficient. In *Sparke v. Montriau* (t), it was said that the mere circumstance of a defendant incorporating a deed in his answer, whether by referring to the schedule or otherwise, was not a ground for compelling its production, if in other respects such compulsion would be inequitable (u).

(t) 1 Y. & C. Ex. 153.

(u) See also *Howard v. Robinson*, 4 Drew. at p. 526.

EDITORIAL REVIEW.

The Proposed Bankruptcy Bill.

We print in this number a contribution from Mr. D. E. Thomson, which exhibits the principles upon which the Boards of Trade have framed the measure which they hope may become law during the approaching session of Parliament.

The foundation of the whole structure, namely, the distribution of assets merely, and not the discharge of the debtor from his liabilities, will have a wholesome effect, and will tend to prevent speculative assignments which were so frequent under the late Insolvent Act. We hope that, if the measure becomes law, this will be the principle underlying the Act.

The suggestion that there should be a certain number of eligible trustees only, being persons who have given security to the Government for the due performance of their duties, is a step towards prevention of the abuses that were attendant upon the old law. Still, it is but a short step. It seems to us that the trustee or assignee of the insolvent estate should be a person who owes allegiance neither to the creditors nor to the insolvent himself; nor should he be a private person whose business it is to thrive upon a percentage of wrecked estates, and whose aim it is so to manage estates as to swell his own private income. There is no very serious objection to administering the insolvent estate of a living person, in much the same way as the insolvent estate of a deceased person is administered in the Chancery Division. The writer entertains the idea that all insolvent estates should be administered by means of the machinery of a court of bankruptcy, the officers of which should be put upon stated salaries, the estates being taxed

as in ordinary cases of legal proceedings by payment of fees in stamps. An act of bankruptcy having been committed, a creditor could, upon making a proper case, issue process from the Court upon which the Sheriff could act. If a liquidation were desired by the debtor himself, he might file a petition therefor upon which the same process might issue to the Sheriff. The proceedings thereafter need not vary to any great extent from those proposed by the Boards of Trade, but they would be from the beginning judicial proceedings. If the officials administering the estates were professional men—say the Local Masters of the Supreme Court of Judicature—questions of law might be argued before them in the first place, subject to appeal to a Chief Judge in Bankruptcy, whose decisions might be made subject to review by the Court of Appeal.

When the Boards of Trade ask the Parliament of Canada to legislate directly upon landlords' rights, it is very questionable whether they are not asking the Parliament to cross the frontier of Federal jurisdiction. The proposed legislation is not directed to the estate of the bankrupt, or its management or distribution, but is levelled directly at the contract between the landlord and his tenant. We understand the proposal to be that, upon a bankruptcy, the landlord's premises shall be expropriated for the period of two months at an occupation rent only, and this even though the term be by the lease declared to have ceased upon the bankruptcy taking place. This is a direct interference with the landlord whose contract is a lease, for the benefit of those creditors whose claims arise upon other contracts. So, the power of the Parliament may be doubted to make a contract for the landlord that he shall pay for improvements made upon the leased premises, when he may have expressly contracted that he will not be bound to pay for them. In the absence of express contract, the improvements upon the premises become the landlord's by the law of property, and if his rights rest upon that law alone, and we think they do, any such attempt to abrogate them would be clearly beyond the authority of the Parliament. It is quite competent for that

body, of course, to bring the landlord's claim to a level with those of other creditors; to deprive him of his ordinary remedies for collection of rent, just as other creditors might be deprived of execution; to compel him to rank with them on the dividend sheets; but it seems to be going too far to interfere with his contract in any way, either by subtracting from it, adding to it, or varying it. Even if the proposed enactment be not *ultra vires*, it may apparently be evaded by skilful conveyancing. For it is apprehended that if there were a limitation over upon bankruptcy, that would not be within the proposed Act; and we think there is no doubt that such a case could not be reached by an Act respecting bankruptcy.

Lay Practitioners.

We have frequently made complaints about unprofessional conveyancers, but we have not until now heard of one, who was impudent enough to openly undertake business which renders him liable to be punished for contempt of Court.

We have now in our possession an advertisement for creditors, cut from a newspaper, which purports to be published pursuant to the Act respecting Trustees and Executors, R. S. O. cap. 107, sec. 34, signed by a personage, who we are informed, is a Justice of the Peace, but who appends to his signature to the advertisement, "Attorney for Administratrix." In the body of the advertisement he twice designates himself "Attorney."

This has been sent to us by a gentleman of standing in the profession, who asserts that he can name no less than twenty-three of these gentry in his Riding, as against ten solicitors, all of whom not only practise conveyancing, but make a business of practising in the Surrogate Court. He asserts that this man in particular advertises himself as a "Conveyancer, Commissioner in H. C. J. etc., Probate and Surrogate a specialty."

This appears to be a very plain case against the advertiser, and one deserving of summary treatment; and we commend

it to the attention of the Benchers, who would receive the thanks of the profession, if they would instruct the Solicitor to the Law Society to take the necessary proceedings to bring this empiric to his senses.

The Land Law Reformers.

Mr. Holmested's letter, at another page, speaks for itself. He admits, as one of the results of the Torrens System, what we surmised with respect to trusts, namely, that land would no longer be the security for trust funds that it now is. In fact, trusts, as they now exist, could not exist under the Torrens System. Whether or not this is a desirable attainment is very questionable, but is not made a question by the agitators. The sole question presented by them, so far, is the method of transfer. Everything else is ignored. Many of the uses and benefits to which land may now be put and which no other species of property can be made to serve, are not merely made subservient, but are completely sacrificed to the idol of transfer. Conveyancing is at present the means whereby land may be put to many beneficial purposes. It is now proposed that it shall be destructive of them all. With the abolition of Trusts in land, would be swept away one of the most powerful and useful branches of Equity Jurisprudence, and what else may go down with the wreck it is impossible to foresee. We should like to see an intelligent examination of results attendant upon the proposed reforms. It is with results we shall have to deal. If it were proposed to accomplish openly what will be accomplished as a result of the proposed amendments, the Association would not gain much headway. The bodies to which the Association has addressed itself, namely, the County Council of York, the Council of Toronto, the Board of Trade of Toronto, august bodies though they be, are not competent to deal with such questions. And the gentleman who undertook to read a paper on the subject to the Canadian Institute, able though he be as a financier, is not a competent man to discuss a measure upon a subject as to which his Association's pamphlet says it is "a recondite

one," and that "even amongst the legal profession there are few who attain a complete mastery of the subject."

Simplicity in conveyancing and the simplification of titles are desirable ends, but we must not pay too high a price for them.

Administration of Justice in Manitoba.

From newspapers received from Winnipeg it appears that the mass of litigation in Manitoba is becoming very formidable. The subject is seriously occupying the attention of the profession there. A meeting of the Bar was held some weeks ago, at which it was resolved that the Benchers of the Law Society be appointed a committee, to memorialize the Lieutenant-Governor in Council to bring into force by proclamation a late Act providing for the appointment of additional Judges for the Province. It appears from another resolution, adopted at the same meeting, that there are over seven hundred cases awaiting trial in Manitoba, which is said to be directly attributable to the want of Judges. This resolution concludes that the Government of Canada be requested to appoint additional Judges, and the Bar urge that such appointments should be made from amongst the members of the Bar in the Province.

With great deference to our professional brothers in Manitoba, who may well be supposed to know their own business better than outsiders, we venture to think that the condition of affairs there at present is abnormal. The stubborn fact exists that there is a mass of litigation, of which some part is composed of arrears, and that three Judges cannot dispose of it within the limit of the time that should be assigned to it. If there were any certain indication that this would continue, it would be criminal negligence to defer the appointment of a sufficient number of Judges to dispose of the work rapidly. But in the meantime a special commission might well be resorted to, to assist in clearing away the cases now on the docket for trial. If the press of business continues thereafter we are sure no one would begrudge Manitoba as many Judges as she wants.

Changes in the Judiciary.

After much delay, the vacancy in the Court of Appeal has been filled by the elevation thereto of Mr. Justice Osler as the fifth Judge thereof, under the Ontario Statute of last session.

Mr. J. E. Rose, Q.C., takes Mr. Justice Osler's place in the Common Pleas Division.

With respect to the County Bench, Judge Gowan retires after a lifetime spent in the service of his country, taking with him an enviable reputation for uprightness and learning. He is succeeded by Judge Ardagh, late Junior Judge of the County Court of the County of Simcoe; and Mr. William Boys succeeds Mr. Ardagh.

Mr. C. R. Horne has been appointed County Judge in Essex in the place of Judge Leggatt, deceased.

NOTES OF RECENT DECISIONS.

Armstrong v. Forster, postea, Occ. N. The question at issue in this case has recently been the subject of judicial investigation in the Province of Quebec. In *The Canada Guarantee Co. v. McNicholls*, 6 Leg. N. 323, the majority of the Court of Queen's Bench, on an appeal from the Superior Court, affirmed the judgment of that Court, holding the sureties of an official assignee liable in a similar case, the Chief Justice and Ramsay, J., dissenting. The latter learned Judge puts the case as follows:—"The Act, by section 28, having dealt with the official assignee and his security, proceeds by section 29 to provide for the appointment of an assignee who may or may not be an official assignee, and it is provided by that Act that he shall give security 'in manner, form, and effect, as provided in the next preceding section.' Therefore it is said he is not an official assignee, and the law has specially provided how the estate shall be protected against his wrong doing. On the other hand, it is said that by section 28 it is expressly provided that the official assignee's security is for the benefit of Her Majesty, and for the benefit of the creditors of any estate 'which may come into *his possession under this Act*.' The estate came into his possession under this Act, and it was under this Act he always held it. Notwithstanding the strength of this second proposition, I think the force of argument is in favour of the first proposition. When it says the bond of the official assignee shall be for the benefit of the creditors of any estate that comes into his possession under this Act, it naturally means, acting in the capacity there referred to. Now, it is plain he did not act as official assignee after the appointment by the creditors. It was not in virtue of his official position he acted, but in virtue of his appointment. It was entirely the fault of the creditors if they did not exact security." With great deference to the learned Judge, we find it hard to believe that

the Legislature intended that a person, already under bonds for the due performance of his duties under the Act, should find other or additional sureties upon the acceptance of an appointment to the very duties which are contemplated by the Act. There are several ways in which an estate might have come into the possession of an official assignee under the Act, viz., 1st, as official assignee; 2nd, as creditors' assignee (if we may use the expression) on default of appointment; 3rd, by express appointment. And in enacting that security should be given for any estate that might come into the assignee's hands, the Legislature did not limit the applicability of the security to estates coming to his hands in any particular way. There is no estate excluded from the benefit of the security on account of the manner in which it might have come to the assignee's hands. Section 28, subsection *a*, has some bearing on the point. An official assignee may be required to give additional security, on petition of a creditor to the Court or Judge, such additional security being for the special benefit of the creditors. Does not this exclude any other manner of obtaining any security additional to that which the official assignee has already given? The creditor, on appointing an assignee, may fix the amount of his security; but if a creditor desires that the security of an official assignee be increased, it can be done only upon petition to the Court, and to such amount as the Court may order.

In *Dansereau v. Letourneau*, 5 Leg. N. 339, the view taken by Mr. Justice Ramsay in McNicholl's case was taken by Mr. Justice Jetté, who held that the official assignee, upon appointment by the creditors, ceased to hold the estate as official assignee, and thenceforward held it under the title conferred upon him by the creditors. But in *Delisle v. Letourneau*, 3 Leg. N. 207, Mr. Justice Johnson was of opinion that the sureties were liable. As far as the Province of Quebec is concerned, the decision of the Appellate Court must be considered as having set the question at rest.

This is one of the debatable points that might well be set at rest by explicit phraseology in framing another measure.

BOOK REVIEW.

Notes of Practice Cases, being Notes of Decisions and Dicta (English and Canadian), Illustrative of the Ontario Judicature Act and Orders, Subsequent to the Annotated Editions of the said Act up to July 1, 1883. By A. H. F. LEFROY, M.A., Barrister-at-Law and Reporter of the Chancery Division of the High Court of Justice for Ontario, and R. S. CASSELS, B.A., Barrister-at-Law. Toronto: Rowsell & Hutchison. 1883.

This little book is destined to be a very useful one. The cases decided upon the different rules are grouped under the numbers of the rules, and cross references are made when necessary. The similarity or identity of the Ontario rules with the English rules are also noted under each; the new rules are printed; and in an appendix we have a table showing the correspondence by number between the new English rules and our own.

The learned authors, at p. 165, refer to *Western Canada L. & S. Co. v. Dunn* as reported 19 C. L. J. 211 upon the decision of the Master in Chambers, but as *unreported* upon the decision in appeal, whereas the motion before the Master, the appeal therefrom, the subsequent motion and the appeal from it, are all reported in this volume at p. 359.

CORRESPONDENCE.

The Torrens System of Land Transfer.

To the Editor of the Canadian Law Times :

SIR,—I do not care to pursue the discussion any further of the literary merits of the pamphlet of the Canada Land Law Amendment Association. The legal principles which it assumes to treat of are of so elementary a nature, that of course any ignorance concerning them, which might have been manifested in the pamphlet, would be almost inexcusable, however excusable ignorance upon the more technical and intricate questions of real property law may be. As you have generously withdrawn your insinuation that the pamphlet is remarkable as a display of ignorance, and content yourself with exercising your wit on its literary style, I am content to say no more than that *de gustibus non disputandum est*. I would, however, with your permission like to say a word on the evils of the present system of land transfer and tenure in Ontario, and of the advantages of the Torrens system, which you consider are not sufficiently brought out in the pamphlet.

The first and foremost evil in the present system is the principle of having to trace titles through successive owners; and this is what the Association aims at getting rid of. I would have thought, but for your article, that this defect in the present system is sufficiently treated of in the pamphlet in question to satisfy the meanest comprehension.

Now, what the Association wishes to substitute for that principle, is a registration of *ownership* of land—in other words, to apply to land the principle on which stocks and shares are transferred. Any one at all familiar with the

latter class of property knows that there is no such thing required to be done as to trace up the successive owners of stock or shares which you wish to buy. A man holds a certificate that he is the owner of certain shares; you go to the bank or company's office, and you find there is no obstacle to his transferring them, a transfer is made by some brief and simple instrument, and the transferee is then registered as the owner in the place of the transferor.

Here you have in brief the principle of the Torrens system of land transfer. The owner of a parcel of land having given satisfactory proof of ownership to the public officer appointed for the purpose is placed on the register of owners. His registration as owner precludes the necessity of searching into the rights of previous owners. He stands henceforward in the same position as a registered owner of shares in a bank. If he wishes to transfer, the system of transfer is similar to a transfer of shares, and upon the transferee being registered as owner, any person dealing with him is under no necessity of investigating the title of previous owners. In short, the system which necessitates the tracing of a *chain of title* is effectually done away with. In your former article, you thought the system defective in not providing means for protecting improvident persons, or infants, etc. But the system in force in Australia enables a person to vest property in trustees. And by the insertion with certificate of title of the words "no survivorship" a transfer is prevented by any less than the original number of trustees. So far as seeing to the execution of trusts is concerned, however, that is a matter which any purchaser from the registered owner is exonerated from. In fact, no cognizance of trusts at all is taken in the register; *cestuis que trustent* under the Torrens system must protect their own interests in the same way that they now protect their interests when trusts are declared of shares or stock; they and not purchasers from their trustees must see to and be responsible for the honesty of their trustees. A trust deed may, I believe, be deposited in the Registry Office for safe keeping, but it does not appear in any way upon the register of title.

The method of registration is accomplished in this way : a folio is opened in the register for each particular lot or parcel of land of which the ownership is to be registered ; this folio is a counterpart of the certificate of title issued to the owner. Upon this folio is recorded all dealings short of an actual transfer of the owner's whole estate, e.g., all leases, mortgages, etc. On a transfer of his whole estate, or remaining interest as the case may be, the folio opened for the transferror is cancelled and a new folio is opened for the transferee. To this folio are transferred all incumbrances which affect the latter's title ; so that the state of the title at any given time as regards incumbrances, leases, etc., appears all collected under one head. Moreover, documents of dubious legal import, cannot, as under our present system be left to rankle and fester in a title like a sore disease, and break out at last into a virulent eruption after the property has passed into the hands of unsuspecting purchasers. Persons dealing with land are required to put their transactions into proper legal form, at the outset, or they cannot be registered at all. The disease is met and cured at its very commencement and not left to bear its fruit of woe to innocent persons in future years.

As I have already pointed out if the full scheme of the Association be adopted and all land be converted to the status of chattels real, the limitation of land in any other way than personal estate can be limited would cease to be possible. From my experience of the way in which estates tail are created in this country, I should say that in nine cases out of ten they are the creatures of accident rather than design, and that they are for the most part the result of an artificial legal construction of documents rather than the deliberate purpose and intention of the parties, and that so far from the construction effectuating the intention of parties, it more frequently frustrates it, and in many cases leads to great loss and injury to innocent persons, if they can be called innocent whose only fault is that they are not thorough masters of our real property law. Under these circumstance, I strongly approve of Hodge's opinion as expressed by you that the further pro-

creation of fee tails of whatever description should be strictly prohibited with the utmost rigour of the law. If Hodge has arrived at this opinion through reading the Association pamphlet, he has arrived at the very conclusion the Association wished him to arrive at, and he has received into his head a very sound conclusion.

The curious jargon which real property lawyers have created must indeed sound very insensible to plain Mr. Hodge, and it is because there is all this mystery and technicality about the present law of real estate that neither Hodge nor any other person than a professional lawyer can ever hope to understand it. But laws which are so mysterious, technical, and incomprehensible to persons of ordinary intelligence, are not what a matter of fact community requires. If we can put the law of real property on a footing that any man of reasonable intelligence can understand it, why should it not be done? Law is not in its highest ideal intended to be a trap and a snare for those whose rights are to be governed by it. If it is in any sense a trap or snare it stands *ipso facto* condemned. Our present law of real estate has over and over again proved such a trap and snare, and it appears to me it is only to be endured until a better system can be devised. The Torrens system I believe to be a far better system, and the sooner it is adopted the better I believe it will be for the country.

GEO. S. HOLMESTED.

REVIEW OF EXCHANGES.

Albany Law Journal.—3rd November, 1883.

Devise for Life with Power of Disposal. American cases are cited.

The Presumption of Identity, by JOHN D. LAWSON. Rule 1. Identity of name raises a presumption of identity of person, where there is similarity of residence, or trade, or where the name is an unusual one. But *aliter* where the name is a common one and there are several persons known of that name and of the same place. Rule 2. The fact that the family name and initials are the same, raises no presumption that the parties are the same. Rule 3. Where two persons of the same name occupy different positions or relations, the presumption is that they are different persons. Rule 4. The initials preceding a surname are presumed to be the initials of a name, and not the abbreviation of a title. Rule 5. Where an interest is claimed, mere identity of name to the person entitled is insufficient. Rule 6. Where father and son, or two persons of different ages, bear the same name, that name when used is presumed to indicate the father or the elder of two, as the case may be.

Ibid.—10th November, 1883.

Common Words and Phrases. Continued in the following number. Presence; Domicile, Residence; Clerk; Track; Absolutely Necessary; Manufacturer; Confectionery; House; Family; Exclusive; Uninterrupted and Continuous; Public Bar; Store; Manufacture; Operation of Railway; Additions; Growing Crop; Together, with each other; Good Health; Open Account; Olographic Will; Tool; Between Sundown and Sunrise of any day; are defined.

Trusts for Repose of Souls, by HUGH WRIGHTMAN. In *Gilmor v. McArdle*, lately decided in New York, moneys were placed in the hands of an undertaker, with the direction that after the death of the depositor and her husband, he should use the fund to have masses said for repose of their souls. *Held*, that the gift could not be upheld as a trust, because there was no *cestui que use* in existence. It was said that the *souls* of the departed being the beneficiaries were incapable of taking an interest in the property. The decision is challenged, on the ground that the church is the true beneficiary through its priests.

In *Kehoe v. Kehoe*, 22 Am. L. Reg. 656, it was held that the doctrine of superstitious uses has never been adopted in the U. S. A. as being inconsistent with the religious liberty guaranteed by the Constitution. A learned note is appended thereto by Marshall D. Ewell, who cites *Gilmor v. McArdle*, distinguishes and approves it.

In *Elmsley v. Madden*, 18 Gr. 386, it was held that a bequest by a member of the Roman Catholic Church of a sum of money for the purpose of paying for masses for his soul was not void in Ontario, and though Strong, V.C. did not feel called upon to determine the point, he thought that as all bodies of Christians are entitled to enjoy equal toleration, it would be good on that ground.

American Law Register.—October, 1883.

Nolae and Vibration as Elements of Nuisance, by SEYMOUR D. THOMPSON. A very exhaustive article which deals with the subject matter from every point of view. Numerous English and American cases are cited.

American Law Review.—September-October, 1883.

The Future of Our Profession, by JOHN M. SHIRLEY. The origin and growth of the Profession in England and the U. S. A. is traced. Complaint is made of the multiplicity of legal tribunals in the U. S. A., of the overcrowding of dockets, of the multiplicity of reports, and of "judicial legislation." The learned writer does not very clearly define his remedy, but it seems to be to minimize the functions of juries and try causes by means of referees.

The Common Law and Statutory Right of Woman to Office, by MARTHA STRICKLAND. "A search through the old and modern reports reveals no real departure, and she seems to have been considered as capable of serving almost all the offices of the Kingdom not of a strictly judicial character. She could be marshal, great chamberlain, and constable of England, the champion of England and the commissioner of sewers. She might be jailor, forester, and appoint a deputy to attend the *eyre*. Lady Broughton was keeper of the prison, of the gatehouse of the dean and chapter of Westminster. In the 2nd of Anne a woman was governor of the workhouse of Chelmsford. In the 12 Geo. II. the election of a woman to the office of sexton of a parish was contested, and it was held that she might both vote for and be elected to the office; and in the 29 Geo. III., it was adjudged that a woman might be appointed overseer of the poor. She might hold the office of common constable, and as we have seen, the office of sheriff might be inherited and its functions fulfilled by her. These latter offices, and particularly that of sheriff, were not strictly ministerial, partaking somewhat of the nature of a trust, and in a degree judicial. But in all deputies might be made, and on this ground, mainly, were the appointments of women maintained. It was said, 'One who holds in fee by a personal service may make a deputy, *for the estate may descend to a woman, infant, etc., who may be incapable to do it in person.*' "

In *Tully v. Farrell*, 23 Gr. 49, it was held that women who were pew-holders had a right to vote at an election of churchwardens.

The Supreme Court and State Repudiation—The Virginia and Louisiana Cases, by JOHN NORTON POMERY.

Former Jeopardy, by CHARLES E. BATCHELDER. A review of English and American authorities.

Central Law Journal.—10th August, 1883.

Does a Bonue Make a Loan of Money Usurious ? by ISAAC N. PAYNE.

Ibid.—17th August, 1883.

The Measure of Interest, by ELISHA GREENHOOD. The conflict of laws receives attention first. The subject is then discussed under the heads. Rate after Maturity, Rate after Judgment, Interest upon Interest, Loss and Suspension of Interest. Numerous authorities are cited.

Ibid.—24th August, 1883.

Survival and Assignment of Actions, by ADDISON G. MCKEAN. Many English and American cases are cited, and the effect of Statutes considered.

Stipulations to Pay Exchange in Negotiable Paper, by ADELBERT HAMILTON. A promise to pay a specific sum "and all fines, according to rule," is not a negotiable promissory note; nor is a promise to pay "the value of four days' labour." Other examples are given. A note for a fluctuating sum is good between the parties. Exchange fluctuates according to the condition of commerce and consequently the amount of a note or bill payable "with exchange" is uncertain. Does this destroy its negotiability? In Michigan it has been held that a written promise to pay a specific sum "with current exchange on New York" is a negotiable promissory note, on the ground that exchange is merely an incident to the transmission of money from one place to another.

Ibid.—31st August, 1883.

Garnishment, Funds in the Hands of an Administrator, by M. W. HOPKINS. In Massachusetts, it has been held that money in the hands of an administrator cannot be garnisheed, unless the administrator has been adjudged to pay a certain sum to a certain creditor against whom attachment proceedings are waged. So, in New Hampshire, Vermont has a statute forbidding it. Delaware, Maine, and New York are also against garnishment.

Conditions in Conveyances, by E. W. CUNNINGHAM. English and American cases are cited.

Ibid.—14th September, 1883.

Liability of Joint Promissors as affected by Payments made by one of them, by W. T. BROWN. The old English doctrine, the statute changing the law, and the laws of the several States of the Union are given.

Corporations—Power of Expulsion, by ADDISON G. MCKEAN. The power cannot be exercised without express authority by joint-stock corporations where the capital is divided into shares and the corporation has for its object pecuniary gain. Where the charter is silent, expulsion is justified for an infamous crime; for an offence against the corporator's duty; for a mixed offence against the corporation's duty, and indictable by law. The corporator is entitled to notice, except where he appears and defends himself; but when a member has been convicted by a jury of an infamous crime, notice or preferment of charges is unnecessary.

Ibid.—21st September, 1883.

Chattel Mortgage—Stock in Trade—Right of Mortgagee to Sell and Re-Invest under the Mortgage, by WM. ARCHER COCKE. Some English and American chattel mortgage cases are reviewed.

Ibid.—28th September, 1883.

Stipulation in a Note to Pay Attorney's Fee—Control of Court over. ANONYMOUS. In a case where attorney's fee was stipulated for, and was thought by the Court to be excessive, it was reduced. The decision is challenged on the ground that if the contract for it was valid it should have been enforced as it was formed, and not moulded to suit the views of the Court.

Imputable Negligence, by M. W. HOPKINS. "The doctrine now generally accepted is, that the care required of a child is only such as is to be expected from one of his maturity and discretion, if he exercises such care, he may recover for an injury caused by the negligence of another, although a person of full age and capacity acting in like manner might be chargeable with contributory negligence, which would be fatal to his right of action."

Ibid.—5th October, 1883.

On the Degrees or kinds of Negligence in our Present American Law, by WM. W. KEYSOR. An excellent review of the American Law.

The Literary Property of Authors, by G. W. M. After some fluctuation of opinion in the U. S. A., it has been settled that the public performance of a play, the like delivery of a sermon, lecture, or essay, is not such a dedication to the public as to entitle a listener or spectator to reproduce it.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

[27TH OCTOBER, 1883.]

WEST SIMCOE ELECTION CASE.

Dominion controverted election—Corrupt Practices—Acts of Agent.

H., a tavern keeper in the electoral district, had been appointed a delegate to the convention at which the respondent was nominated to contest the election, and attended thereat. The respondent addressed the meeting, calling on his supporters to use their best endeavours to secure his return. On polling day H., whose tavern was distant about a mile from the polling booth, kept his bar open during the hours of polling and treated a voter to drink who was passing by.

Held, Burton, J.A., dissenting, that H. was the respondent's agent, and that the treating was such a corrupt practice of an agent as voided the election.

Per Burton, J.A. A candidate is not to be held responsible for the acts of his agent done outside the scope of those which the candidate has authorised him to do.

In re DONOVAN; WILSON v. BEATTY.*Solicitor and client—Refunding costs.*

The order of Proudfoot, J., 29 Gr. 280; 1 C. L. T. 698, reversed. Spragge, C.J.O., dissenting, the Court being of opinion that the taxation of the bills of costs referred to, and all the other proceedings in reference thereto, having been taken in the absence of the solicitor, he was not bound thereby.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 24TH NOVEMBER, 1883.]

McCLUNG v. McCRAKEN.

Specific performance—Undisclosed principal—Contract by correspondence.

The judgment of Ferguson, J., ante, p. 39; 2 Ont. R. 609, was affirmed, Armour, J., doubting whether the correspondence did not constitute a sufficient memorandum to satisfy the Statute of Frauds.

Rose, Q.C., and J. H. Macdonald, for the plaintiff.

MacLennan, Q.C., for the defendants.

FOOT v. RICE.

Deficiency from false survey—Compensation—Trusts declared of original lot—Disclaimer by cestui que trust—Improvement under mistake of title.

G. W. F. being the patentee of a certain lot described as of 200 acres but in which there was a deficiency, conveyed half of the lot to J. B. P., who conveyed it to trustees to hold in trust for E. F., wife of G. W. F., upon certain trusts declared in the deed, and without power to her to anticipate. It was subsequently discovered that there was a deficiency in the lot, and

upon the application to the Government in the name of the trustees by G. W. F., whom they appointed their agent for that purpose, a grant of land as compensation for the deficiency was made to the trustees of E. F. describing them as such. Subsequently an instrument under seal expressed to be made between J. B. P., of the first part, E. F., wife of G. W. F., of the second part, and the trustees of the third part, which recited the facts, and also that the trustees had no real interest therein, but were named as grantees merely as being the legal owners of the original half lot, was executed by J. B. P. and E. F., whereby they declared that the parties of the first and second parts were not in any way interested in the lands granted as compensation, and that the trustees held them as trustees for G. W. F., the patentee of the original lot. Subsequently the trustees under the direction of G. W. F. conveyed to E., under whom the defendants claimed. E. F. now brought this action to recover the land.

Held, Hagarty, C.J., dissenting, that E. and those claiming under him must be held to have had notice of the title of the trustees who were described in the patent as trustees of E. F., that E. F. was not stopped by the declaration executed by J. B. P. and herself, which did not divest her of her title, and that therefore she was entitled to recover.

Held, also that there should be a reference to the master to take an account of taxes paid and permanent improvements made upon the lands, further consideration being reserved.

Per Hagarty, C.J. The legal estate being in the defendant by conveyance from the trustees, the plaintiff should show an equity to recover what she claims as part of the trust estate, which she has not done; that the patent to the trustees, though describing them as such did not in terms declare any trust respecting the land, and it could not be assumed that they formed part of the trust premises.

Per Armour, J. The case was not within R. S. O. cap. 95, sec. 4, as to improvements under a mistake of title, but was governed by the principles of equity governing the relationship of trustee and *cestui que trust*.

Per Cameron, J. The case was within the Act.

HENDRIE v. NEELON.

Contract for sale of timber—Non-delivery—Loss of profits—Measure of damages.

The plaintiff contracted to deliver timber to the defendant at Sheboygan to be transported by him to Quebec for sale there. There was no market nearer to the place of delivery than Quebec. The plaintiff made default. In an action of debt, the defendant counterclaimed for damages for non-delivery of the timber.

Held Cameron J., dissenting, that the measure of damages was the value of timber at Quebec less the cost of transportation thereto from the point of delivery.

Osler, Q.C., for the defendant.

E. Martin, Q.C., for the plaintiff.

CHANCERY DIVISION.

[HAGARTY, C.J., 23RD OCTOBER, 1883.]

GRAHAM v. ROSS.

Mortgage—Covenant to build on mortgaged premises—Acceleration of payments on default—Forfeiture—Costs.

The plaintiff sold to the defendant a piece of land and took a mortgage back for the whole purchase money, payable in nine years, with covenants to clear and fence a certain portion yearly, and to build a house within a year. There was a proviso that if default was made in building, or in any other covenant, the whole principal money should become due. The plaintiff obtained an interim injunction restraining the defendant from cutting and removing timber, on the ground that he was depreciating the plaintiff's security. At the trial, the learned Judge was of opinion that the only covenant or proviso of the mortgage that had been broken was the covenant to build within the year.

Held, that there was no power to relieve against forfeiture on this account: but the Court, considering the plaintiff's conduct to have been harsh and oppressive in instituting the action, and alleging breaches which were not proved, and in hindering the defendant from performing his covenant to clear the land by means of the injunction, and thus causing him damage, awarded the defendant his costs of suit, including the costs of opposing the injunction motion, and refused the plaintiff his costs.

[PROUDFOOT, J., 7TH NOVEMBER, 1883.]

ARMSTRONG v. FORSTER.

Insolvent Act of 1875—Official assignee appointed creditors' assignee—Liability of Sureties.

In an action against the sureties in a bond conditioned for the due performance of the duties of H., an official assignee under the Insolvent Act of 1875, the defence alleged that the creditors duly appointed H. assignee of the estate, but did not require him to give any security, and that any money received by him was received by him under the appointment of the creditors, and that he held it as creditors' assignee and not as official assignee.

Held, on demurrer, bad; for the official assignee, in default of appointment by the creditors would have remained assignee of the estate, by sec. 29 of the Act, and no additional or increased risk was cast upon the sureties, beyond what would have been incurred without the appointment.

McFARREN v. JOHNSON.

Contract by correspondence.

The plaintiff, on the 30th May, sent a postal card to the defendant, offering him \$1,500 cash for a piece of land. The defendant replied by letter on 11th June, "you offer \$1,500, and I ask \$2,500. Now, I might be induced to meet you half way and take \$2,000 cash." 13th June; plaintiff by letter said that the defendant, instead of an alleged frontage of fifty feet, had only thirty-five feet available, as fifteen feet had to be kept for an entrance to the rear, and said that his offer was a good one. 19th June; defendant replied by letter, "for the thirty-five feet frontage back to the useless rear, I am willing to take \$1,500, and retain the fifteen feet and said rear . . . after ten days should I not obtain a better offer I will . . . take \$1,750 cash." 25th June; defendant telegraphed plaintiff, "Coming Monday to accept \$1,500; waiting immediate reply." Same day; plaintiff telegraphed defendant, "Come at once."

Held, that this correspondence did not constitute an agreement.

[14TH NOVEMBER, 1883.]

In re LEA AND THE ONTARIO & QUEBEC RAILWAY CO.*Dominion Railway Act—Arbitration and award—Appeal—Practice.*

Held, that no appeal lies from the award of arbitrators appointed under the Dominion Railway Act, 1879; the provisions of R. S. O. cap. 165, sec. 20, s.-s. 19, being limited to appeals in respect of railways under Provincial jurisdiction.

Such an award can only be attacked by action, or by making the submission a rule of Court and then moving against it.

This proceeding was by petition by way of appeal.

Held, that the Court had no power to turn the proceedings into an action, nor, on the material before it, to enlarge the time for making the submission or award a rule of Court.

[OSLER, J., 2ND NOVEMBER, 1883.]

FERRIS v. FERRIS.

Alimony—Desertion—Evidence.

The plaintiff in an alimony action, alleged, but did not prove acts of violence by her husband; but the husband in his statement of defence charged her with adultery, and persisted therein at the trial, but offered no evidence thereof, and it was denied by the wife.

Held, sufficient proof of desertion, though the wife had left the husband's house after the charge of adultery had been made, though forbidden to do so.

An offer to receive the wife back was considered by the learned Judge at the trial not to have been made *bona fide*, but the judgment was stayed for six weeks to permit such a settlement to be made.

IN CHAMBERS.

[WILSON, C.J., NOVEMBER, 1883.]

In re MEEK v. SCOBELL.

Division Court—Claim for damages and debt—Damages above jurisdiction—General abandonment—Prohibition.

The plaintiff sued in the Division Court on a claim which was originally composed of a solicitor's bill of costs, \$36.06; damages, \$69.33; fee for advice, \$6; total, \$111.39. At the trial the plaintiff abandoned as to \$11.39 without specifying from what items he threw this amount off. The learned Judge at the trial reduced the \$69.33 to \$62; and the total then stood, \$92.67.

Held, that, the abandonment being general, it could not be assumed that the plaintiff had reduced his demand for damages so as to give the Court jurisdiction, and a prohibition was ordered.

A. C. Galt, for the motion.

Meek, in person, contra.

DEMOREST v. MIDLAND RAILWAY CO.

Mandamus to company—Service on president only—Disobedience—Attachment—Sequestration.

A writ of mandamus, directed to the defendant company, commanding them to serve a notice upon the plaintiff, containing a description of lands taken by them, etc., under the Railway Act, was served upon the president of the defendant company, and was disobeyed. A motion was now made for an attachment against the president and for a writ of sequestration against the estate and property of the president and company.

Held, (i) that the writ of mandamus was properly directed to the company, although some particular person or persons within the corporation was or were to do the act required; (ii) that an attachment could not be

granted against the president (being the only member of the corporation served), because he alone could not do the act required by the mandamus; (iii) that sequestration was not the appropriate remedy.

Holman, for the motion.

Marsh, contra.

[17TH NOVEMBER, 1883.]

In re GARLAND v. OMNIUM SECURITIES CO.

Division Court—Cause of action—Jurisdiction—Prohibition.

The plaintiff, living in Ottawa, being in arrears for interest on a mortgage, was requested by the defendant Company, carrying on business in Hamilton, to transmit the money to them. He refused to do so, alleging that they were not entitled to the interest claimed, and they gave notice of sale under the power in their mortgage, and commenced an action to recover the mortgaged premises. The plaintiff then paid the money to his solicitors in Ottawa, who remitted it under protest to the Company's solicitors in Hamilton, who paid it to their client. The plaintiff then commenced an action in the Division Court at Ottawa, to recover the money paid under protest.

Held, that the request to pay made by the Company before their notice of sale was revoked upon the plaintiff's refusal and the commencement of the Company's proceedings; that the payment made thereafter was in law made in Hamilton, and that the cause of action therefore did not accrue wholly within the jurisdiction of the Division Court at Ottawa, and a prohibition was ordered.

In re BROWN; BROWN v. BROWN.

Administration—Commission—Computation of.

This was an administration matter. As a result of the enquiries made in his office, the Master at Cornwall found that the sum of \$2,451.17 had come into the hands of the defendant, the administratrix, of which she had properly paid out in payment of creditors, and claims against the estate the sum of \$1,625.97, leaving a balance due from her of \$825.20. In fixing the commission under the General Order, he made his computation upon the basis of the whole sum which had come into the hands of the administratrix, and an order for distribution was made in accordance therewith. On applying for cheques, the accountant declined to issue same, ruling that the commission should have been computed upon the sum at present remaining in the hands of the administratrix, viz: \$826.20.

Hoyles, for the plaintiff, applied for a direction to the Accountant to issue cheques in accordance with the Master's Report.

Hoskin, Q.C., for the infants.

Cattanach for the administratrix.

They contended that *Re McColl*, 8 P. R. 480, was an authority in favour of the mode adopted by the Master. The whole sum has been adjudicated on and dealt with by the Court, and is therefore the "amount realized" within the provisions of the G. O. 643.

PROUDFOOT, J., 1ST NOVEMBER, 1883, stated that this was his opinion, and that the Master had made his computation upon a correct basis, and directed that the cheques should be issued to the parties entitled, according to the Master's Report.

[9TH NOVEMBER, 1883.]

In re WINSTANLEY & CARRICK.

Vendor and purchaser—Will, construction of—Estate tail—Restriction on alienation.

After devising certain land to one of his daughters by his will, dated 26th October, 1852, a testator proceeded, "The remaining lot * * I bequeath to my daughter E. R., and that she shall not dispose of the same only by will and testament, and if either of my daughters shall depart this life without leaving issue, then and in such case the survivor shall be possessed of the share of the deceased sister."

Held, that E. R. took an estate tail, and that the restriction upon alienation, being partial, was valid.

CLARKE v. THE UNION FIRE INSURANCE CO.

McPHEE'S CASE.

Winding up Insurance Company—Joint policy—Claim for rebate by one policy-holder.

On 5th September, 1881, the defendants the Union Fire Insurance Company issued a policy in favour of James McPhee and Fanny McPhee, his wife. On 28th December, 1881, the defendants' Company went into liquidation, and William Badenach was appointed Receiver. Shortly afterwards the Receiver notified policy holders and others to bring in their claims against the Company. On 4th February, 1882, James McPhee, without consulting his wife, the other beneficiary, wrote to the Receiver claiming a rebate of \$5.04 of premium paid on the policy.

On 24th February the property insured was destroyed by fire. On 27th February, the Receiver mailed a number of postal cards to the various policy holders, notifying them that an arrangement to reinsure the Company's risks had been effected, and that the policy holders might send in notices, up to 15th March, expressing their election as to taking re-insurance or rebate of premium. One of these cards was sent to James McPhee, who immediately replied that he claimed for the entire amount of the

policy. Notwithstanding this, the Receiver subsequently entered the claim for rebate on his schedules as allowed.

The claim under the policy came before the Master in Ordinary, but upon the objection being raised that a claim for rebate on the same policy had been made and allowed, the Master considered that this allowance would have to be got rid of before the claim on the policy could be proceeded with. A petition was accordingly presented to the Court by James McPhee and Fanny McPhee.

A. C. Galt, for the petitioners, contended that the policy having been made in favour of both claimants, a claim for rebate by one of them alone was inoperative and void, and that the Receiver had no authority to allow such a claim. The contract being joint, both must unite in acting under it; *Wetherell v. Langton*, 17 L. J. Ex. 341.

W. A. Foster, for the plaintiff, contended that a claim for rebate amounted to a surrender of the policy, and that the claim having once been filed by the Receiver, the Statute operated to make it a binding allowance; R. S. O. cap. 160.

Bain, Q.C., for the defendants, argued that it must be assumed that James McPhee had authority to act for his wife; and he also read a certificate from the Receiver stating that in consequence of the claim for rebate, he had not reinsured the risk. He cited *May on Insurance*, (1873) ss. 279, 280; and *Zimmerman v. Woodruff*, 17 U. C. R. 388.

Galt, in reply, cited *Right v. Cuthell*, 5 East 491, shewing that a surrender, or an acceptance of a surrender, by one of several joint tenants will not bind the others.

PROUDFOOT, J., 28th November, 1883.—*Held*, following *Right v. Cuthell*, that the claim for rebate was nugatory, and could not bind either of the joint holders of the policy. That the entry by the Receiver of the allowance for rebate was erroneous and must be struck out, and that the claimants were entitled to prove for the full amount of their claim under the policy, with costs.

(Reported by A. C. Galt, Esquire, Barrister-at-law.)

[28TH NOVEMBER, 1883.]

In re CORNISH.

Mechanic's lien—Failure of Contractor—New contract—Retaining ten per cent.

The original contractor for the erection of a building failed to complete his contract, and his surety entered into a new contract for the completion of the work and finished it. The owner did not retain the ten per cent. of the work done by the original contractor, and now claimed that he was obliged to retain only ten per cent. of the contract price of the work done by the person completing the building.

Held, that he was bound to retain ten per cent. of the whole price for the benefit of those who might be entitled to liens, and that he was not at liberty on failure of the original contractor to apply the ten per cent. which he should have retained to the completion of the work.

Snelling and George Ritchie, for lien holders.

Allan Cassels, for the owner.

[21ST NOVEMBER, 1883.]

MCINTYRE v. THOMPSON.

Mortgage—Collateral security—Parol evidence to explain.

T. being indebted to M. on a promissory note, and M. having pressed him for payment, T. applied to M. as agent of a Loan Company to procure a loan upon mortgage of his land in order to pay off this and other claims. When the mortgage was sent to M. to get it executed, it was agreed, as the Master at Lindsay found, that it should stand as a security for M.'s claim. The loan was finally refused on account of a defect in the evidence of title. M. then notified the Company of the circumstances and procured an assignment of the mortgage from them to himself to secure his claim.

Held, affirming the decision of the Master at Lindsay, that M. was entitled to hold the mortgage as a security for his debt.

Held, also, that parol evidence was admissible to show that it was a security for other purposes than repayment of the specific sum mentioned in it.

CLARKE v. THE UNION FIRE INSURANCE CO.

THE AGRICULTURAL INSURANCE CO.'S CASE.

Winding up Insurance Company—Re-insurance—Ranking on Schedule after Schedule prepared.

The order for winding up the Union Fire Insurance Co. was made in 1881, and the Receiver's Schedule was prepared in September, 1881. The policy holders were all ranked on this schedule. Afterwards with the assent of the policy holders, a re-insurance was effected with the Agricultural Insurance Company by agreement dated 21st January, 1882, and a note at three months was given by the Union Fire Insurance Company for the required premium. This note was not paid at maturity.

Held, that the subject of the claim existed before the schedule was prepared though in a different shape, viz., as a liability for rebates to policy holders, that the Agricultural Insurance Company were entitled to be subrogated to the position of policy holders, and were therefore entitled to be collocated upon the dividend sheet for principal and interest.

MCGARVEY v. THE VILLAGE OF STRATHROY.

Injunction—Appeal—Staying execution.

An injunction was granted restraining the defendant from causing more water to flow on the plaintiff's land than would naturally flow upon it. The defendants appealed to the Court of Appeal and perfected the security required by the Court of Appeal Act. A motion was now made for a sequestration for breach of injunction.

Held, following *Dundas v. Hamilton & Milton Road Co.*, 19 Gr. 455, that the perfecting of the security operated as a stay of proceedings to enforce the injunction, and the motion was dismissed.

McLaren v. Caldwell, 29 Gr. 438, not followed.

In re DONOVAN ; WILSON v. BEATTY.*Payment into Court to stay execution—Appeal—Payment out.*

On the appeal from the order directing Mr. Donovan to pay a sum of money, he obtained leave to pay this money into Court instead of giving security, in order to stay execution. The appeal was allowed; 1 C. L. T. 698.

Notice of appeal to the Supreme Court of Canada was given. Mr. Donovan now moved for payment out of the amount paid into Court by him, and deposed that it had been so paid in to stay execution. The respondents deposed that it was their *bona fide* intention to prosecute the appeal to the Supreme Court, and that they apprehended danger to the fund if it were paid out.

Held, that the money, having been paid in lieu of the bond to stay execution, on the appeal to the Court of Appeal, had served the purpose for which it was paid in and should now be returned.

BAILEY v. MONTEITH.

Judgment under Rule 80—Administration proceedings.

The plaintiff, a creditor of William Monteith, deceased, brought an action against the administrator with the will annexed to recover his debt, and after appearance moved for judgment under Rule 80. In answer to the motion, it was shown that the administrator with the will annexed, finding the estate very much involved, and that there was a deficiency of assets, had obtained an administration order in the Chancery Division. It was not shown that any proceedings had as yet been taken thereunder. The Master in Chambers refused the motion without costs. The plaintiff appealed. The defendant then gave notice of motion, returnable on the same day as the appeal, for an order staying all proceedings in this action,

on the ground that the estate would be administered in the Chancery Division.

A. C. Galt, for the appellant, cited *Doner v. Ross*, 19 Gr. 229; *Re Langtry*, 18 Gr. 530.

MacGregor, contra, contended that judgment should not be summarily entered under Rule 80, but that the discretion of the Court should be exercised in favour of the disposal of all matters relating to the estate in the administration proceedings.

WILSON, C.J., 17th October, 1883, dismissed the appeal, holding however that the plaintiff was entitled to rank on the estate for his costs of action, including costs of this motion and appeal in addition to his debt.

HUGHES v. HAND-IN-HAND INS. CO.

HUGHES v. LONDON ASSURANCE CO.

Fire policy—Statutory condition—Reference to arbitration—Staying proceedings.

Actions on fire policies. The defendants did not admit the plaintiff's right to recover. The policies contained the statutory conditions. The defendants gave notice to the plaintiff that they intended to arbitrate pursuant to the 16th statutory condition, which declares that "if any difference arises as to the value of the property insured, of the property saved, or amount of the loss, such value and amount, and the proportion thereof (if any) to be paid by the Company shall, whether the right to recover on the policy is disputed or not, and independently of all other questions, be submitted to arbitration * * ; and such reference shall be subject to the provisions of *The Common Law Procedure Act*; and the award shall, if the company is in other respects liable, be conclusive as to the amount of the loss and proportion to be paid by the company." By section 214 of the C. L. P. Act, it is enacted that, when the parties to any deed or instrument in writing agree that any existing or future differences shall be referred to arbitration, an action at law in respect of the matters so agreed to be referred, may be stayed.

The Master in Chambers stayed the actions, upon the application of the defendants.

G. H. Watson, for the plaintiff, appealed from this order and contended that, as the plaintiff's right to recover on the policies was not admitted, it would be useless to arbitrate.

J. B. Clarke, contra.

ARMOUR, J., 23rd November, 1883, allowed the appeal with costs.

[THE MASTER IN CHAMBERS, NOVEMBER, 1883.]

THE CITIZENS' INSURANCE CO. v. CAMPBELL.

Particulars—Striking out.

An action of libel. The defendant pleaded a statement of the truth of the publication in general terms. Upon this an order was made for particulars. The plaintiffs, not being satisfied with the particulars as being too general, moved to strike them out.

Held, that they could not be struck out, but if too general the admission of evidence offered thereunder must be in the discretion of the Judge at the trial.

[23RD NOVEMBER, 1883.]

PARIS MANUFACTURING CO. v. WALLS.

Interpleader--Sale of goods before application.

The sheriff, having seized certain goods to satisfy an execution, was notified by the defendants of their claim. He allowed a sale, advertised by the defendants, to proceed, on their paying to him the amount of the execution to abide the result of an interpleader.

Held, that the sheriff was not under these circumstances deprived of his right to apply for an interpleader order.

ROBINSON v. BERGIN.

Attachment against absconding debtor—Binds from seizure.

The sheriff, having received writs of attachment against an absconding debtor, gave his warrant to his bailiff to attach all the personal property, credits, effects, etc., of the absconding debtor. The bailiff went to, and entered upon, the land of the debtor on which his family resided, and there finding no goods, did not leave any one in possession; he said that he had no instructions to seize the land beyond the warrant; he told the debtor's wife at the time that the land would be sold, but he did no other act of seizure. The land was subject to a mortgage, and was sold by the mortgagee, and the surplus paid over to the sheriff. On an interpleader application between attachment creditors with writs of *fi. fa.* against lands in the sheriff's hands, and prior execution creditors,

Held, following *Kingsmill v. Warrenner*, 13 U. C. R. 18, that the writs of attachment did not bind the land without seizure, that there was no seizure in this case, and therefore that the prior execution creditors should succeed.

TAXING OFFICE.

[16TH NOVEMBER, 1883.]

ARCHER v. SEVERN.

Taxation of costs—Appeal to Court of Appeal—Fee to Counsel.

In this case, which was for the construction of a will (ante p. 546), the costs were directed to be paid out of the estate, those of the executors to be taxed as between solicitor and client.

Held, by Mr. Thom, taxing officer, that he was not restricted by Order 29 of the Court of Appeal Orders to the allowance of a fee not exceeding \$80 to Counsel for the executors, and an increased fee was taxed.

H. C.

[26TH NOVEMBER, 1883.]

KLEIN v. THE UNION FIRE INS. CO.

Taxation of costs—Motion for attachment.

One of the defendants was ordered by the judgment to execute a discharge of a mortgage. On his refusal to do so, a motion was made to the Court for an attachment. On the return of the motion the discharge was produced, properly executed, and no order was made, save that upon payment of costs the application should be refused. Upon taxation, Mr. Thom, taxing officer, ruled that costs of a Court motion should be allowed, the practice being that a motion for an attachment, when made for non-compliance with the rules of practice or with orders of course, should be made in Chambers, but when made for non-compliance with a judgment of the Court, should be made in Court.

R. S. Cassels, for the plaintiff.

W. Seton Gordon, for the Company.

Mills (Foster, Clarke & Bowes), for the defendant ordered to pay costs.

H. C.

MANITOBA.

In the Queen's Bench.

KEATING v. MOISES.

Patent issued in error—Fraud—Constitutional law—Laws in force in Manitoba.

The patentee of land declared a trustee for the party legally entitled, the patent having been issued to her in error upon false and fraudulent representations made by her.

The periods noted at which different systems of law have been in force in the Province of Manitoba.

The bill was filed on behalf of Mary Keating, the infant grandchild of the late Edward Kenny, praying that the patent for lot 48, in the Dominion Government survey of the parish of St. James, issued to her grandmother, the defendant Mary Burns Moises, might be cancelled, or that the said defendant might be declared to be a trustee for the plaintiff of her interest in the said land. The defendants, besides the grandmother, were H. S. Crotty, who obtained a conveyance of part of the land before the patent issued; Richard Wolf, who, a few days after the issuing of the patent, took a conveyance from a person who had obtained a conveyance before the issuing of the patent; Terence Wrightson, to whom Mary Burns Moises in the first instance conveyed the land, and who, it is alleged, never parted with any interest he thereby acquired; Ellen Brenan, Mary B. Agnes Torrance and Theresa Keating, daughter of Edward Kenny, who joined in divers conveyances to persons through whom Crotty and Wolf claimed title.

The ground on which the plaintiff claimed to be entitled to the relief prayed, was that the patent was granted to M. B. Moises in error, she having made false and fraudulent representations to the Government, as to the persons interested in the land or entitled thereto as representatives of Edward Kenny.

It appeared that Edward Kenny died some time in 1863, being then, and having for a number of years been, in possession of the land under some agreement with the Hudson Bay Company; and in July, 1870, the defendant M. B. Moises, the widow of Kenny, his son and daughters, including the mother of the plaintiff, were in possession of the land. The bill alleged that Kenny held a lease from the Hudson Bay Company of the land for 999 years from 1851, but no formal lease seems ever to have been

made; there was, however, an entry in the land Registry Book of the Company identifying him with this particular lot.

Ewart and Andrews, for the plaintiff.

Howell, for the defendant Crotty.

Culver, for the defendant Wolf.

TAYLOR, J.—The Imperial Act 8 & 9 Vict. cap. 106, was referred to and relied on by the defendant, and it was contended that Kenny could not be regarded as a tenant having a lease from the Hudson Bay Company, as by that statute every lease must be by deed. That Act, however, was not in force here in 1851, the date at which, as appears by the entry, Kenny's connection with the land seems to have begun. Up to 11th April, 1862, the law in force here was the law of England at the date of the Hudson Bay Company's charter. Then, on the 11th April, 1862, the law of England at the date of Her Majesty's accession was introduced. This continued to the 7th January, 1864, when the law of England as it stood at that date was declared to be the law of Assiniboia.

By the Statute of Frauds, which undoubtedly was in force in 1851, leases not in writing and signed by the party executing the same have the effect of leases at will only. Here the memorandum or entry in the Hudson Bay Company's registry was not signed by any one, and it does not seem to contain particulars from which it could be treated as an agreement for a lease; for instance, no term is mentioned for which the grantee was to hold the land. Kenny then seems to have been in possession of the land, with the sanction and under the license and authority of the Hudson Bay Company. If a tenant of the Company, he was only a tenant at will, and the tenancy determined at his death on the 24th May, 1863. After his death the widow, M. B. Moises, and his children continued in possession, and were in actual possession in 1869; and in 1870 they so continued in possession with the sanction and under the terms and authority of the Hudson Bay Company, and were in my opinion the owners of the land, within the meaning of that clause of sub-section 3 of section 32 of 33 Vict. cap. 3 of the Statutes of Canada, and so were the persons entitled to call upon the Crown for the grant of an estate in freehold.

It was argued that, if so, under the terms of 43 Vict. cap. 7, sec. 1, of the Statutes of Canada, their right to ask for a patent became barred on the first of May, 1882; but here a patent was applied for within the time, and the right thereto recognized, although the Crown was deceived as to other persons entitled to receive it. The application for a patent was made by M. B. Moises in 1873, and by her affidavit in support of her claim on the 30th July of that year she swears, "that about the year 1863 my late husband, Edward Kenny, died intestate, leaving one child, Edward Kenny." It cannot be that, when she made that affidavit, she had any idea that the heir at law was the person entitled, for in that case she would have used the expression "one son." I think she used the expression one child, suppressing the fact that there were really five children, with the deliberate intent of deceiving the Crown. Then, a further affidavit was made by her on the 2nd November, 1881, in which she states, that she is

the widow of Edward Kenny, and mother of Edward Kenny, the younger, that she resided on the land on the 15th day of July, 1870, had resided there for more than ten years before, and continued to reside there about seven years after. She then stated that her son was born while she resided on the lot, giving the date, and that he was ten years old on 15th July, 1870; also, that he resided with her from his birth until he left the land. On the same day Edward Kenny, then a young man twenty-one years of age, made an affidavit in which he swore "that the facts stated in his mother's affidavit were, he believed, true in substance and in fact." On this occasion, as on the former one, no mention is made of the existence of the other members of the family, or of the possession of the land by them. I do not think there is much force in the argument that the Minister of Justice evidently considered the heir-at-law, and not the children generally, entitled, when he required legal evidence to be furnished by the claimant, "that her son's right as heir-at-law had been vested in her." The claim made disclosed the existence of one child only, a son, and no more, and he would naturally be spoken of as heir-at-law of his father.

The son having released his interest to his mother, and the Crown having no notice or knowledge of any other possible claimants, the patent issued to her on the 23rd January, 1882.

The case made by the bill, as the foundation of the plaintiff's claim to relief is not very well stated. She alleges a lease from the Hudson Bay Company to her grandfather for 999 years; then his death is stated; and the names of his widow and children are given; and then the death of her mother, his daughter Ann, is stated, and she claims to be heir-at-law and next of kin of her mother; then an actual occupation of the land by the various members of the family, including her mother, on the 15th July, 1870, is alleged; and, after stating the various assignments and conveyances which have been made, she submits that the patent should be declared void, and that the defendant M. B. Moises should be declared a trustee for her share of the land. I do not think that the widow of Edward Kenny could, by her second marriage, confer upon her husband any right as the owner of the land, within the meaning of the 3rd sub-section of section 32 of the Manitoba Act. There is no evidence that he ever occupied with the sanction and under the license and authority of the Hudson Bay Company.

The father of the infant, the husband of Ann Keating, makes no claim to a share. By filing the bill as next friend of his infant child, and claiming that she alone is entitled to any share or interest which his dead wife had, he may well be taken to have waived any claim on his own behalf.

This is not a case in which the Crown, with the knowledge of all the facts, after exercising a deliberate judgment upon them, has granted the land to the defendant. It is a case in which the Crown, by a wilful and in my opinion fraudulent concealment of facts, has been induced to grant a patent, and I have power under the statute to declare the patent void as issued through error. It is not, however, necessary to do so, as complete relief will be given to the plaintiff by declaring M. B. Moises to be a trustee for her other share of the land. The defendants Crotty and Wolf derived title to the land under persons who obtained conveyances from the defendant Moises before any patent to her had issued; they therefore took

the land and now hold it subject to and affected by any equities which the plaintiff can set up against her.

The proper decree will be to declare M. B. Moises a trustee for the land in question, to the extent of a 2-15th share thereof, for the plaintiff, and that all parties claiming title thereto under her are affected with notice of the trust, and hold the land subject thereto.

The bill has been taken *pro confesso* against all the defendants except Crotty and Wolf. I give the plaintiff her costs against the defendants Moises, Crotty and Wolf; no costs to or against the other defendants.

IN CHAMBERS.

HENRY v. BOWES.

Mechanic's lien—Suit by subsequent lien holder—Costs.

In this case the bill was filed to enforce a mechanic's lien, and the usual decree was made with a reference to the Master to take the accounts.

It appeared on the reference that one McConnell had filed a lien upon the same property, in respect of the same work as the plaintiff's, and, after bill filed and *lis pendens* registered by the plaintiff, had himself taken similar proceedings to enforce his lien, and by superior diligence had obtained a decree before the plaintiff's decree had been pronounced. McConnell appeared in the Master's office in this suit, and claimed that he was entitled to the costs of filing his bill, and subsequent costs up to taking the account, in addition to the amount of his lien.

George Patterson, for McConnell. The rule is the same as the practice of the court in administration suits, Daniel Ch. Pr. 1108; there are no circumstances in this case sufficient to take it out of the general rule. The 9th section of the Mechanics' Lien Act provides that the practice shall be the same as in other cases in equity.

Hough, for the plaintiff. This is a class suit, although the proceedings are taken by the plaintiff in his individual name. The 24th section of the Mechanics' Lien Act takes it out of the general rule in administration suits, and to that extent qualifies the 9th section.

TAYLOR, J., affirmed the ruling of the Taxing Master, disallowing all costs of proceedings to enforce the lien.

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